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No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia Circuit has created a completely new standard for determining whether the unconstitutional provisions in a statutory section may be severed from the remaining provisions. Under this standard, the traditional approach of determining congressional intent is no longer the lodestar. It has been replaced by a requirement that the challenging party show that Congress would have preferred *no legislation* in the subject area at all rather than the remaining provisions of the statutory section. The questions thus presented are:

1. Did the D.C. Circuit err by establishing a new severability standard that would allow the remaining statutory provisions to survive even though they function contrary to congressional intent and there is evidence that Congress would have enacted a different type of statute if it had known that certain provisions were invalid?

2. Did the court of appeals err in holding that a legislative veto provision in the employee protection program in Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982), is severable from the remainder of that section simply because the court concluded that Congress would have preferred the severed statute to no employee protection at all?

PARTIES TO THE PROCEEDINGS

Petitioners are Alaska Airlines, Inc.; American Airlines, Inc.; Capitol Air, Inc.; Delta Air Lines, Inc.; The Flying Tiger Line, Inc.; Midway Airlines, Inc.; Northwest Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; USAir, Inc.; Western Air Lines, Inc.; and Wien Air Alaska, Inc.*

Respondents are William E. Brock, individually and as Secretary of Labor (as successor in office to Raymond J. Donovan); United States Department of Labor; the United States of America; and the following intervenors: Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

Amici are Air Florida; Air One, Inc.; Arrow Air, Inc.; Empire Airlines; People Express Airlines, Inc.; and Southwest Airlines Co.

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* In accordance with Supreme Court Rule 28.1, the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners are set forth in App. D hereto.

TABLE OF CONTENTS OF PETITION

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS OF PETITION	iii
TABLE OF CONTENTS OF APPENDIX	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
A. Statutory Background	2
B. Proceedings Below	5
REASONS FOR GRANTING THE WRIT	7
I. THE TEST FOR SEVERABILITY ADOPTED BY THE COURT OF APPEALS IS CONTRARY TO SUPREME COURT PRECEDENT	11
II. THE DECISION BELOW CREATES A CONFLICT IN THE SEVERABILITY ANALYSIS AMONG THE CIRCUIT COURTS	16
III. UNDER TRADITIONAL SEVERABILITY DOCTRINE, THE LEGISLATIVE VETO PROVISION IS INSEVERABLE FROM THE REMAINDER OF SECTION 43	20
CONCLUSION	22

TABLE OF CONTENTS OF APPENDIX

	Page
A. Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit	1a
B. Opinion of the United States District Court for the District of Columbia	30a
C. Constitutional Provisions, Statutes and Regulations Involved	38a
D. Petitioners' Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates, Pursuant to Supreme Court Rule 28.1	63a

TABLE OF AUTHORITIES

CASES Page

Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985) 1, 7, 8, 12, 20, 21
Alaska Airlines, Inc. v. Donovan, 594 F. Supp. 92 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985) 1, 3, 6, 7
Aptheker v. Secretary of State, 378 U.S. 500 (1964) 12, 13
Bellotti v. Baird, 443 U.S. 622 (1979) 18
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) .. 11
Califano v. Westcott, 443 U.S. 76 (1979) 13
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 12, 15
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) 11, 13
Davis v. Wallace, 257 U.S. 478 (1922) 19
Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982) 7-8, 8
EEOC v. Allstate Insurance Co., 104 S. Ct. 3499 (1984) 8, 11
EEOC v. Allstate Insurance Co., 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 104 S. Ct. 3499 (1984) 19
EEOC v. CBS, Inc., 743 F.2d 969 (2d Cir. 1984) 17
EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984) 18
EEOC v. Pan American World Airways, 576 F. Supp. 1530 (S.D.N.Y. 1984) 11
El Paso & Northeastern Railway v. Gutierrez, 215 U.S. 87 (1909) 15
Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979) 19
Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied*, 105 S. Ct. 173 (1984) 16
Heckler v. Edwards, 104 S. Ct. 1532 (1984) 8
Heckler v. Mathews, 104 S. Ct. 1387 (1984) 12, 19
Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985) 14
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 4, 8, 10, 11, 12, 14, 15

TABLE OF AUTHORITIES—Continued

Page

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 7
McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 18-19
Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984) 19
New York v. Ferber, 458 U.S. 747 (1982) 12
Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216 (1983) 11, 15
Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935) 12
Regan v. Time, Inc., 104 S. Ct. 3262 (1984) 12, 13, 14, 17
Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980) 19
Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981) 18
Sloan v. Lemon, 413 U.S. 825 (1973) 12
Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910) 15
Spraigue v. Thompson, 118 U.S. 90 (1886) 15, 17
United States v. Jackson, 390 U.S. 570 (1968) 15
United States v. Nixon, 418 U.S. 683 (1974) 7
Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 13, 19
Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) 13

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 1 2
U.S. Const. art. I, § 7, cl. 2, 3 2
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982)) ..... *passim*
49 U.S.C. app. § 1301 note (1982) 14
49 U.S.C. app. § 1552 (1982) ..... *passim*
49 U.S.C. app. § 1552(a) 3
49 U.S.C. app. § 1552(b) 3
49 U.S.C. app. § 1552(c) 3
49 U.S.C. app. § 1552(d) 3

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. app. § 1552(f) (2)	4
49 U.S.C. app. § 1552(f) (3)	4
49 U.S.C. app. § 1552(f) (4)	4
49 U.S.C. app. § 1552(h) (1)	3
Federal Aviation Act, 49 U.S.C. app. § 1301 note (1982)	14
Federal Salary Act, 2 U.S.C. § 359(1) (B) (1976)	18
Reorganization Act of 1977, 5 U.S.C. §§ 901, *et seq.* (1982)	17
Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984)	17
28 U.S.C. § 1252 (1982)	6, 7
28 U.S.C. § 1254(1) (1982)	1, 7
28 U.S.C. § 1291 (1982)	8
LEGISLATIVE AND EXECUTIVE MATERIALS	
S. Rep. No. 631, 95th Cong., 2d Sess. (1978)	3, 20
H.R. Rep. No. 1779, 95th Cong., 2d Sess. (1978)	21-22, 22
48 Fed. Reg. 52,854 (1983)	2, 4, 5

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alaska Airlines, Inc., *et al.*, hereby petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reversing the district court, is reported at 766 F.2d 1550 (D.C. Cir. 1985), and appears at App. A. The opinion of the district court is reported at 594 F. Supp. 92 (D.D.C. 1984), and appears at App. B.

JURISDICTION

The opinion and judgment of the court of appeals was entered on July 16, 1985. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc on September 11, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article I, Section 1.

United States Constitution, Article I, Section 7, Clauses 2 and 3.

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982).

Department of Labor regulations under Section 43 of the Airline Deregulation Act of 1978, 48 Fed. Reg. 52,854-65 (1983).

The constitutional provisions, statutes and regulations involved are reprinted in App. C.

STATEMENT

The D.C. Circuit has adopted and applied in this case a completely new standard for determining whether Congress intended a statutory section to survive even though integral provisions therein have been held unconstitutional. Under the court's test, a preferential hiring scheme authorized in Section 43 of the Airline Deregulation Act of 1978 (hereinafter "Deregulation Act" or "ADA") would survive even though it functions contrary to the intent of Congress unless the challenging party can demonstrate to the court that Congress would have preferred no employee protection program at all. The traditional test—whether Congress would have intended the surviving provisions of the section to function independently of the invalidated provisions—has been discarded. Thus, the court rejected as irrelevant evidence that Congress would have preferred a different form of employee protection if it had known that certain provisions in the program it enacted were invalid.

A. Statutory Background

In 1978, Congress passed the Deregulation Act, which mandated the phasing out of economic regulation of domestic aviation. *See* Pub. L. No. 95-504, 92 Stat. 1705

(1978) (codified in scattered sections of 49 U.S.C. app. (1982)). Congress correctly predicted that deregulation would increase airline industry employment overall, S. Rep. No. 631, 95th Cong., 2d Sess. 113, 115 (1978) (hereinafter "Senate Report"), but it recognized the "theoretical possibility" that some employees might lose their jobs as a direct result of the ADA. *Id.* at 113. As "insurance" against this unlikely contingency, it enacted Section 43, which authorized certain benefits for "protected employees," *i.e.*, employees who as of October 24, 1978, had at least four years of employment with an airline then certificated by the Civil Aeronautics Board ("CAB"). Section 43(h)(1), 49 U.S.C. app. § 1552(h)(1) (1982).

Subsection (f) of Section 43 authorized the Department of Labor ("DOL") to issue regulations, subject to a legislative veto, to implement the two "closely linked components" of the employee protection program ("EPP"). *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 93 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985). First, if an air carrier experienced severe work force contractions or bankruptcy as a result of the Deregulation Act, its furloughed or terminated "protected employees" were entitled to monthly assistance payments and other monetary benefits from the federal government. *See* Section 43(a), (b), (c), 49 U.S.C. app. § 1552(a), (b), (c). DOL was to publish guidelines establishing the amount of assistance payments for various employment categories. As the second part of the program, selected airlines (*i.e.*, CAB-certificated carriers as of October 24, 1978) were to have a duty to hire "protected employees" who were terminated by competing airlines. *See* Section 43(d), 49 U.S.C. app. § 1552(d). DOL proposed extensive regulations to implement this part.

Since Congress was uncertain about the need for, and dimensions of, such a new regulatory program in an act whose purpose was deregulation, it established unusually elaborate procedures to ensure continuing congressional

involvement in the program's development. Congress directed DOL to promulgate regulations implementing the EPP "within six months" of October 24, 1978. Section 43(f)(2), 49 U.S.C. app. § 1552(f)(2). It further established a two-stage congressional review process. First, proposed rules were to be submitted to congressional committees responsible for aviation oversight for thirty "legislative days" (*i.e.*, days "on which both Houses of Congress are in session"). Section 43(f)(3), (4), 49 U.S.C. app. § 1552(f)(3), (4). Thereafter, DOL's final rules were to be submitted to the entire Congress for an additional sixty "legislative day" review period. *Id.* During this period the rules were subject to veto by either house of Congress. This is the only legislative veto provision in the entire Deregulation Act. It expressly limited and exclusively applied to Congress' Section 43(f) grant of new regulatory authority to DOL, a Department not otherwise involved in airline deregulation. The Deregulation Act does not contain a severability clause.

Despite the six-month deadline, DOL did not publish the final regulations at issue here until November 22, 1983, five years after the statutory deadline. *See* 48 Fed. Reg. 52,854 (1983). The regulations ignored the Government's compensation obligations under Section 43 and attempted to implement only the duty to hire aspects of the EPP. On June 23, 1983, this Court had declared legislative veto provisions unconstitutional, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), but DOL nonetheless delayed the regulations' effective date for sixty legislative days (*i.e.*, until on or about May 17, 1984).[1]

The regulations establish a preferred class of "designated employees," which includes employees terminated or furloughed for reasons totally unrelated to deregulation. *See* 48 Fed. Reg. 52,854, at 52,861-62 (1983). The regu-

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[1] The final regulations are reprinted in App. C.

lations impose novel and extraordinary obligations on some, but not all, commercial air carriers. *See id.* at 52,862-64. These include a mandatory obligation to hire "designated employees" laid off by competitors for any job vacancies (*e.g.*, pilots, flight attendants, accountants, secretaries, marketing specialists) before considering any other job applicants, regardless of the applicants' comparative qualifications. This obligation overrides safety-related airline hiring policies and most affirmative action, veterans preference, and other legal hiring duties imposed on the airlines by federal statute. *See id.* § 220.10., .11, .20, .21, .23(j), .24, .29. The hiring duty even extends to persons who are gainfully employed in their occupational specialty by a competing airline at the time they apply. The consistency of DOL's expansive duty-to-hire program with the statutory purpose could not be tested as Congress had intended because the legislative veto had been declared invalid prior to promulgation of the regulations.

B. Proceedings Below

In February 1984, petitioners brought this action against DOL in the district court, and on March 9, 1984, they filed a motion for summary judgment challenging the statute and regulations on several grounds. DOL and several labor union intervenors [2] then filed cross-motions for summary disposition.

On May 18, 1984, the district court (Judge Gesell) granted petitioners' motion for summary judgment, declaring Section 43 unconstitutional. The court held that the invalid legislative veto provision therein "is inex-

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[2] Intervenors are Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America (the latter four hereinafter collectively referred to as "BRAC").

tricably bound to the remainder of that section and that Congress would not have enacted the remainder of § 43 in its absence." 594 F. Supp. at 96 (footnote omitted). Judge Gesell described the applicable standard as follows:

> The question is not, of course, whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the remainder of the statute merely because it might be an approximation of what Congress would have enacted. The task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself.

Id. at 94 n.3 (emphasis original). The district court found Section 43 severable from the balance of the Deregulation Act. *Id.* at 96 n.5.[3]

On July 16, 1985, the court of appeals reversed, setting forth an entirely different standard for determining severability. The court held that the test was not whether Congress would have enacted the rest of Section 43 in the form and language it chose if it knew the one-house veto was unconstitutional. Instead, it held that the remaining parts of the statute must remain as law unless petitioners could show that Congress would have enacted *no law* on the subject at all if at the time of enactment it had known that parts thereof would be declared unconstitutional:

> [T]he challengers must show that it is evident that Congress would have preferred no airline employee

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[3] Pursuant to 28 U.S.C. § 1252, BRAC filed a direct appeal and application for a stay of judgment pending appeal in the Supreme Court of the United States. On May 23, 1984, Chief Justice Burger, acting as Circuit Justice, denied BRAC's stay application, and BRAC later withdrew the appeal before the Supreme Court determined whether it had exclusive jurisdiction.

protection provision at all to the existing provision *sans* the veto provision.

766 F.2d at 1561. *See also id.* at 1560, 1563 and 1564.[4]

REASONS FOR GRANTING THE WRIT

This case presents a question of wide-reaching, fundamental importance: In what circumstances should the remaining parts of a section of a statute survive as valid law if one part of the same section is declared unconstitutional? In reversing the district court, the court of appeals set forth a novel standard of severability that is contrary to decisions of this Court and is in direct conflict with the severability analysis employed in decisions of other circuits. If allowed to stand, the test will result, as in this case, in statutes being permitted to operate in a way Congress never intended.[5]

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[4] On September 11, 1985, the court denied petitioners' petition for rehearing and suggestion for rehearing en banc. On September 28, 1985, the court also denied petitioners' motion for stay of the mandate. Because it invalidated Section 43 in its entirety on the legislative veto issue, the district court did not reach petitioners' other narrower challenges to the regulations. The remaining issues are now before the district court following the court of appeals' reversal and remand. Supreme Court review of the severability issue, which concerns the constitutionality of Section 43 in its entirety, however, is now timely under 28 U.S.C. § 1254(1). *See United States v. Nixon*, 418 U.S. 683 (1974); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[5] The court of appeals also improperly rejected petitioners' contention that the appeal should have been brought directly in the Supreme Court, not the court of appeals. *See* 766 F.2d at 1555-56. Title 28 U.S.C. § 1252 gives the Supreme Court jurisdiction over appeals from district court decisions holding federal statutes unconstitutional in civil actions to which the government is a party. Since Judge Gesell held Section 43 unconstitutional in its entirety, *see* 594 F. Supp. at 96, and the other conditions of Section 1252 are met here, exclusive jurisdiction over this appeal properly lies in the Supreme Court. *See Donovan v. Richland County Association for*

Under the standard now adopted by the D.C. Circuit the remaining parts of a statute must remain in force unless the challenger can meet the heavy burden of showing that Congress would have enacted *no law* on the subject at all if at the time of enactment it had known that parts of the statute it did enact would be declared unconstitutional. *Alaska Airlines, Inc. v. Donovan*, 766 F.2d at 1560, 1561, 1563 and 1564. In order to satisfy this test, petitioners were required to prove that Congress would not have enacted any kind of protection for

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Retarded Citizens, 454 U.S. 389 (1982). For that reason alone, the court of appeals' decision must be vacated. *Id.* at 390.

The Supreme Court did refuse to accept jurisdiction in another legislative veto case, *EEOC v. Allstate Insurance Co.*, 104 S. Ct. 3499 (1984), but it gave no reasons, and the issue presented there, which involved a challenge to the *remedy* ordered by the district court, rather than a challenge to the court's holding that the statute in question was unconstitutional, *see id.* at 3499 (Burger, C.J., dissenting), is distinguishable from the issue presented here. Appellants below did not merely appeal the remedy ordered by Judge Gesell, but instead directly challenged his conclusion that the legislative veto provision was not severable from the remainder of Section 43, thus rendering the entire section unconstitutional. *See* Brief for Appellant Secretary of Labor at 1-2. This Court has recognized that if an entire statute is invalidated because it contains an unconstitutional part, the constitutionality of the *entire statute* is at issue. *See, e.g., Chadha*, 462 U.S. at 931 (issue is whether "§ 244 in its entirety is violative of the Constitution"). This case, therefore, is squarely within the scope of Section 1252:

> If the District Court's dismissal is to be overturned, the appellate court must overturn the holding that the Act in its entirety is unconstitutional. In the words of *Heckler v. Edwards* [104 S. Ct. 1532, 1538 (1984)], "the issue on appeal is the holding of statutory constitutionality."

EEOC v. Allstate, 104 S. Ct. at 3501 (Burger, C.J., dissenting). Since appellants had a right to pursue a direct appeal in the Supreme Court, the court of appeals was deprived of jurisdiction. *Donovan v. Richland County*, 454 U.S. at 389-90; 28 U.S.C. § 1291 (1982) ("courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court").

displaced airline employees if it had known that it could not exercise a veto power over DOL's regulations purporting to implement the program it authorized. This standard ignores the very real possibility that, although Congress wanted some type of employee protection plan, it could well have preferred a different statute—*e.g.*, one with less discretion left to DOL—had it known that it was without power to veto the program created by the agency regardless of how far the program strayed from Congress' intent. In this case the issue is not theoretical for, as shown in Part III below, the congressional conference committee had a clear choice of another, more traditional form of employee protection in the House bill, which did not contain a legislative veto. Instead, the conference committee opted for the novel approach authorized by the Senate which was subject to the veto check.

The well-established precedent of this Court, as well as other circuits, discussed in Parts II and III *infra*, unequivocally demonstrates that the question is not whether Congress would have preferred *some* legislation on the issue to nothing at all, but whether Congress would have enacted the surviving provisions in the form and language it actually chose had it known that other parts of the same section would be declared invalid. To hold otherwise would allow a statute to remain on the books simply because it addresses an issue of concern to Congress, even though it creates rights and duties different from those Congress would have created if the court had left to it the task of enacting constitutionally valid legislation.

The court of appeals' new standard for ascertaining congressional intent whenever part of a statute is invalidated extends far beyond the confines of this case. This new test may have some superficial appeal since invalidation of the entire statute under the traditional standard often results in a legislative vacuum in the subject area—at least until Congress acts again. The D.C. Cir-

cuit's approach, however, would require the courts to rewrite acts of Congress by excising certain provisions. The result would be affirmative legislation which does not operate as Congress intended.

Since it is almost impossible for a challenging party to show that Congress would have preferred no legislation at all in a subject area where it has chosen to legislate, the D.C. Circuit test virtually guarantees severance. Thus, the practical difference between this new test and the traditional standard applied by Judge Gesell is that statutes will now survive even though it is evident that Congress would have enacted a different type of statute without the invalid provisions. The courts will be creating laws that Congress would not have created because the courts will presume that Congress would rather have something than nothing. This approach overlooks the fact that Congress is perfectly capable of filling the vacuum of no legislation with a statute of its own design rather than the court's design. Any burden this places on Congress is no greater than the burden placed by the Constitution, and it avoids judicial intervention into the legislative process. That intervention is analogous to the legislative intervention into the executive function that this Court declared invalid in *Chadha*, or the executive intervention into the legislative process epitomized by the item veto. In each case, what remains after the intrusion is a program which functions inconsistently with the desires of the constitutionally responsible branch of government. Given the importance of the standard of legislative intent applied by the D.C. Circuit, its test, both new and novel, should be reviewed by this Court.

Such review is desirable for additional, practical reasons as well in the wake of this Court's invalidation of legislative veto provisions in *Chadha*. Since Congress has reserved a legislative veto power in nearly 200 statutes, *see Chadha*, 462 U.S. at 967 (White, J., dissenting), the severability of those provisions will continue to be

addressed in the lower courts until Congress has amended each law, or until each statute has been judicially reviewed. Without further guidance from this Court, the lower courts will continue to struggle with the severability issue and formulate an array of different approaches that will inevitably yield inconsistent results. *See, e.g., EEOC v. Pan American World Airways*, 576 F. Supp. 1530, 1535 (S.D.N.Y. 1984) ("there is no clear signal from the Supreme Court to assist the inferior courts in dealing with a host of foreseeable post-*Chadha* problems."). *See also EEOC v. Allstate Insurance Co.*, 104 S. Ct. 3499 (1984) (Burger, C.J., and O'Connor, J., dissenting from dismissal of appeal for want of jurisdiction) (acknowledging that "lingering questions" remain in the wake of *Chadha*); *Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216, 1218 n.* (1983) (White, J., dissenting) (case presents the "important question of whether the legislative veto is severable").

I. THE TEST FOR SEVERABILITY ADOPTED BY THE COURT OF APPEALS IS CONTRARY TO SUPREME COURT PRECEDENT

For more than half a century this Court has held consistently that if one part of a statutory section is declared unconstitutional the entire section must fall if " 'it is evident that the Legislature would not have enacted *those provisions* which are within its power, independently of that which is not.' " *Chadha*, 462 U.S. at 931-32 (emphasis added) (*quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)). *See also Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam). Under that standard, inseverability does not require a judicial conclusion that Congress would have preferred no legislation on the subject rather than a statute with the invalid part severed. Challenged legislation must fall if Congress would have enacted *either* no statute at all *or* a statute in different form and lan-

guage. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (severability improper if the remaining provisions would "create a program quite different from the one the legislature actually adopted.")

The question of severability is a simple one: "What was the intent of the lawmakers?" *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936).[6] Again, the relevant legislative intent is not whether Congress would have preferred the remaining parts of the statute to nothing at all because that would permit a court, through selective severance of provisions, to rewrite the statute in a way Congress did not intend. The Court has cautioned time and again that a reviewing court is not

> license[d] . . . to usurp the policy-making and legislative functions of duly-elected representatives . . . . "[A]lthough this court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially writing it."

Heckler v. Mathews, 104 S. Ct. 1387, 1396 (1984) (*quoting Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964). These principles of judicial restraint apply with equal force in the context of severability analysis:

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[6] Even though the Deregulation Act does not contain a severability clause, the court of appeals relied on a strong presumption in favor of severability to shortcut its analysis, citing *Chadha* and *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (1984), for the proposition that a statute is presumed severable if what remains is "fully operative as law." 766 F.2d at 1559-60. The statute at issue in *Chadha*, however, contained a severability clause, and the "presumption" in *Regan* was not embraced by the majority of the Court. In the final analysis, "severability is exclusively a question of legislative intent." *Regan*, 104 S. Ct. at 3275 n.2 (Brennan, J., concurring in part and dissenting in part) (*citing New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)). *See also Carter v. Carter Coal Co.*, 298 U.S. at 313; *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). As shown in Part III *infra*, the court's heavy reliance on the presumption distorted its analysis of congressional intent.

> [C]ourts addressing questions of severability should be guided by Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation."

Regan v. Time, Inc., 104 S. Ct. 3262, 3275 (1984) (Brennan, J., concurring in part and dissenting in part) (*quoting Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926)). *See also Califano v. Westcott*, 443 U.S. 76, 94-95 (1979) (Powell, J., concurring in part and dissenting in part) ("[The court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than thus rewriting [the statute], we should leave this task to Congress.")

This Court has never held that a severed statute can remain as law simply because a reviewing court concludes that Congress would have preferred the modified version of what it enacted to nothing at all. *See Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("[T]his court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects"). The relevant issue of legislative intent is whether "the legislature would have been satisfied *with what remained*." *Champlin Refining*, 286 U.S. at 235 (emphasis added); *see also Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932) (if the court concludes "that the legislature would not have been satisfied with the statute unless it had included the invalid part," it must hold the law to be nonseverable).

The Court has recently reaffirmed the standard applied by the district court but rejected by the court of appeals in this case, stating that the severability issue is "whether the . . . Legislature *would have enacted the statute* with-

out the invalid portion." *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985) (emphasis added). The Court's decision in *Regan v. Time* is another recent example of this well-established approach. A plurality there held that statutory prohibitions on the use of photographic reproductions of currency violated the First Amendment insofar as they prohibited use for certain purposes, but found that valid provisions of the same statute regulating the size and color of such reproductions could be enforced. In concluding that the size and color restrictions were severable from the purpose requirement, the plurality asked whether the valid restrictions *as enacted* fulfilled the congressional purpose. *See Regan*, 104 S. Ct. at 3270. They did not ask whether Congress would have preferred not to regulate the reproduction of currency at all if it had known at the time of enactment that it could not restrict the purposes of such reproductions.

Besides *Regan*, the only other recent decision of this Court discussing the severability doctrine at any length is *Chadha*, but that case presented a much easier question because the statute at issue contained a severability clause, thus creating a presumption of severability and making it unnecessary to "embark on [the] elusive inquiry" of legislative intent. 462 U.S. at 932.[7] Despite the

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[7] Section 43 is not subject to the general severability provision enacted in 1958 as part of the Federal Aviation Act ("FAAct"), 49 U.S.C. app. § 1301 note (1982). Examination of the entire ADA reveals numerous provisions that do expressly amend the FAAct, *see* §§ 2-40, 92 Stat. at 1705-47, as well as provisions that amend other federal statutes. *See, e.g.*, § 41, *id.* at 1748 (repealed 1982) (amending the Airport and Airway Development Act of 1970). But unlike these other provisions, the text of Section 43 of the Deregulation Act does not purport to amend the FAAct or any pre-existing federal statute. *See* "codification" note to 49 U.S.C. app. § 1552 (1982) (Section 43 was "enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958. . . ."). Thus, Section 43 is not part of the FAAct, and

severability clause, the Court still examined the legislative history in detail to ascertain whether Congress would have enacted the remaining provisions without the legislative veto. *Id.* at 932-34. Justice Rehnquist's severability analysis in dissent is particularly instructive. Joined by Justice White, he observed that the Court has held several times that provisions limiting the operation of a statute, such as veto provisions, are not generally severable because

> "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

Id. at 1014 (Rehnquist, J., dissenting) (*quoting Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)).[8]

The legislative history of Section 43 demonstrates that Congress would not have granted DOL unfettered rulemaking authority without retaining a one-house veto. *See infra* at Part III. Under traditional severability analysis, that fact would mandate a finding of nonseverability, but under the court of appeals' test, it is not enough. Petitioners also had to prove that Congress

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the general severability clause enacted twenty years earlier in the FAAct is not applicable to Section 43.

The absence of a severability clause "itself suggests the inseverability of the provision." *Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. at 1218 n.* (White, J., dissenting). *See also Carter Coal*, 298 U.S. at 312. *Cf. United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("the ultimate determination of severability will rarely turn on the presence or absence of such a clause").

[8] *See also Southwestern Oil Co. v. Texas*, 217 U.S. 114 (1910); *El Paso & Northeastern Railway v. Gutierrez*, 215 U.S. 87, 97 (1909).

would have preferred no employee protection plan if it could not have used the veto device as a check on DOL's program. Such a standard ignores the only relevant inquiry—whether, absent the invalid provision, Congress would have been satisfied with what remained. It would be a rare case in which a responsible court could conclude confidently that Congress would have preferred no legislation at all on a given issue rather than a modified version of what it enacted. If the court of appeals' decision is not reviewed, it necessarily will allow statutes to operate, as in this case, in a way Congress did not intend, simply because the court believes that the revised statute is "better than nothing."

II. THE DECISION BELOW CREATES A CONFLICT IN THE SEVERABILITY ANALYSIS AMONG THE CIRCUIT COURTS

Courts in other circuits almost uniformly have agreed that the reviewing court must look at the statute as actually enacted and determine whether Congress would have been satisfied with the statute in the absence of the invalid provision, not whether the legislature would prefer no statute at all rather than a modified version of it.[9]

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[9] The only court that has adopted an approach similar to that of the D.C. Circuit is the Temporary Emergency Court of Appeals in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied*, 105 S. Ct. 173 (1984), on which the court in this case relied. But unlike the D.C. Circuit, the court in *Gulf Oil* did not hold the statute severable exclusively on the theory that Congress would have preferred the modified version to nothing at all—based on its examination of the legislative history, the court first held that the statutes under review (two energy policy acts) would have been enacted without the veto provisions. *See* 734 F.2d at 804. In contrast, by limiting its inquiry to whether Congress would have preferred no employee protection for airline employees if it could not have retained a veto power, the court in this case failed even to consider whether Congress would have enacted this particular statute—with its broad delegation to DOL to establish a program—had it known that the legislative veto device was not available to oversee the program DOL adopted.

The Second Circuit, in invalidating the entire Reorganization Act of 1977, 5 U.S.C. §§ 901, *et seq.* (1982), because it contained an unconstitutional, inseverable legislative veto provision, applied the same severability standard employed by the district court in this case: "[W]hether Congress would have delegated to the President the broad reorganizing authority granted him by the Act without reserving for itself the one-house veto power contained in 5 U.S.C. § 906(a)." *EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984).[10] The court initially observed that "to hold the veto provision to be severable would confer upon the statute a positive operation beyond the legislative intent . . . ." *Id.* (*citing Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)). If the veto provision were severable, "the President alone then would have been permitted to reorganize the executive branch without any congressional control over the process, short of formal legislation, and this would have been contrary to Congress's intent as expressed in the Act, in the debates on the Act, and in the committee reports that preceded its enactment." 743 F.2d at 971-72. The court concluded that "without such a provision, Congress would have been unwilling to delegate to the President such extensive authority to reorganize the executive branch." *Id.* at 973.[11]

The Fifth Circuit, reviewing the severability of the same veto provision, came to the opposite conclusion but

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[10] The court framed the issue alternatively as "whether Congress was willing to turn the reorganization process over to the President unrestricted and unsupervised." 743 F.2d at 974.

[11] Shortly after the Second Circuit invalidated the Reorganization Act, Congress reenacted the statute without the veto provision. *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984). Thus, instead of judicial modification of the statute, as the D.C. Circuit would counsel, Congress passed revised legislation as the Constitution intended. *Cf. Regan v. Time, Inc.*, 104 S. Ct. at 3290 (Powell, J., concurring in part and dissenting in part) ("[O]ne may assume that Congress—if necessary—would move promptly to enact a more carefully drawn statute.").

employed the same standard for determining severability: "whether Congress would have enacted the remainder of the statute in the absence of the invalid provision." *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984). Neither the Fifth nor the Second Circuit asked whether Congress would have preferred no statute governing the reorganization of the executive branch. Both courts correctly sought to ascertain whether Congress would have given the President such extensive authority in the absence of the legislative veto provision.

The conflict between the standards applied in the Fifth and D.C. Circuits was graphically demonstrated in *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981). A Florida abortion statute required a woman under age 18 to obtain parental consent or a court order authorizing the abortion. The Fifth Circuit held the court approval provision unconstitutional in part because it authorized the court to act in the "best interests" of the minor, without regard to the minor's maturity as is required by *Bellotti v. Baird*, 443 U.S. 622 (1979). *See* 659 F.2d at 480-81. The issue was whether the "best interests" clause could be severed, leaving intact the parental consent provision and the modified court approval option. Despite its conclusion that "[t]he Florida Legislature clearly wished to regulate an unmarried minor's access to abortion . . .," *see id.* at 481, the court held that severance was improper and "refuse[d] the invitation to enter the state legislative arena." *Id.* at 482.

The severability standard adopted in the Fourth Circuit is also diametrically opposed to the D.C. Circuit's approach. In holding a legislative veto provision in the Federal Salary Act, 2 U.S.C. § 359(1)(B) (1976), inseverable from the remainder of the Act, the court looked to the *specific provisions* enacted and asked whether "Congress would . . . have granted the President the power to set congressional, executive, and judicial salaries without this restriction." *McCorkle v. United States*, 559

F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). In concluding that Congress would not have delegated such broad authority without the veto provision, the court stated:

> When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent.

Id. at 1261-62 (*citing Davis v. Wallace*, 257 U.S. 478, 484 (1922)). The First and Sixth Circuits also employ severability doctrines in conflict with the approach of the D.C. Circuit. *See Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 863 (1st Cir. 1980) (issue is "whether the legislature would have enacted [the valid portion] independently of the [unconstitutional portions]"); *Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984) (issue is "whether Congress would have passed the statute absent the offending provision .... Whether Congress would have passed the Reorganizational [*sic*] Act without the one-House veto provision ....").[12]

In each of these cases the court tried to determine whether the remaining provisions would operate as the legislature intended and refused to speculate on whether the legislature might have preferred the remaining provisions to no legislation at all. The cases thus demonstrate an approach to severability that upholds the intent of the legislature without "usurp[ing] the policy-making and legislative functions of duty-elected representatives." *Heckler v. Mathews*, 104 S. Ct. at 1396. By requiring petitioners to prove that Congress would have preferred no protection for employees at all, the court of appeals impermissibly substituted its own judgment for that of

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[12] *See also Gavett v. Alexander*, 477 F. Supp. 1035, 1050 (D.D.C. 1979) (*quoting Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932)); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224, 1230, 1232 (S.D. Miss. 1983), *appeal dismissed*, 104 S. Ct. 3499 (1984).

Congress. The proper inquiry is whether Section 43 would have been enacted in its current form if Congress had known it could not retain power to veto DOL regulations implementing the program. If it would not have been so enacted, allowing Section 43 to stand creates a law that the legislature did not intend to enact.

III. UNDER TRADITIONAL SEVERABILITY DOCTRINE, THE LEGISLATIVE VETO PROVISION IS INSEVERABLE FROM THE REMAINDER OF SECTION 43

By adhering to its standard of severability, the court of appeals did not give proper weight to several critical facts demonstrating that the surviving provisions of Section 43 would not operate as Congress intended. The court actually acknowledged the validity of many of petitioners' assertions, but rejected them all because they could not satisfy the court's "exacting" severability standard. 766 F.2d at 1565. *See id.* at 1561, 1563, 1564.

The court accepted petitioners' assertion that the unusual legislative review provision in Section 43 "reflects, as a whole, a unique combination of features." *Id.* at 1563. But the court dismissed the elaborate nature of the review process as irrelevant because it did not "speak to the issue at hand," *i.e.*, whether "Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision." *Id.* at 1564. Petitioners did not contend that by devising this unique review procedure Congress demonstrated a preference for no employee protection at all over a program absent a legislative veto.[13]

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[13] There is substantial support in the legislative history, however, for the proposition that Congress did not believe that the program would be necessary, and that the provision was included as a "contingency" to address a "theoretical possibility." S. Rep. No. 631, 95th Cong., 2d Sess. 113-15 (1978). Thus, the veto provision gave Congress, *inter alia*, a second chance to determine whether there was even a need for the program as well as the precise design of it.

Petitioners did contend, however, that in delegating to DOL the power to establish a new type of regulatory program that could impose a severe financial burden on the government, that would intrude seriously into airline hiring and the rights of other individuals desiring employment in the airline industry, and that was fundamentally inconsistent with deregulation, Congress intended to ensure its ultimate control over the program's design. The court's decision gives the Secretary the broad regulatory authority to design the EPP but takes away the control Congress deemed critical as a condition of such an open-ended grant.

The court also recognized that the Deregulation Act grants or addresses at least twenty-five distinct delegations of authority, but Section 43 is the only provision in the entire Act to which a legislative veto applies, and it is an integral part of the same subsection (f) which grants the regulatory authority. *See* 766 F.2d at 1563. Adhering to its novel severability test, the court dismissed this point as irrelevant because it "still does not speak to whether Congress would have preferred no employee protection plan at all . . . ." *Id.*

The court's erroneous severability standard also colored its view of the Conference Committee compromise on Section 43. Whereas the House had proposed a traditional employee protection plan that was long established in other regulated transportation industries (*i.e.*, responsibility for employee protection is vested in government or in parties responsible for the dislocations), the Senate version constituted a new, controversial and more broadly reaching intrusion into the private labor market. The Conference Committee adopted the Senate version, which included the veto, but made two important modifications. The revised Section 43 provided less guidance to DOL on eligibility for the rehire program, but simultaneously increased congressional scrutiny.[14] H.R. Rep. No. 1779,

[14] The Conference Committee eliminated a "qualifying dislocation" requirement as a prerequisite for protected employees seeking

95th Cong., 2d Sess. 105-06 (1978). The significance of the compromise is not that it shows that Congress would have declined to enact any protection program had the agreement not been reached, but rather that Congress would not have adopted the novel, unfamiliar Senate version in the form it did, granting almost unlimited authority to DOL to create the EPP, had its members not retained ultimate control over the parameters of the program. If the court's decision is not reviewed, the employee protection program will be permitted to function in a way neither House intended.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue, and the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit should be reviewed by this Court.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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the right of first hire, leaving unclear Congress' intent as to the circumstances under which employees adversely affected by the Deregulation Act would be eligible for the mandatory hiring preference. H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978). The Senate bill had provided simply for a sixty-day legislative review period before both houses of Congress. *Id.* But the Conference expanded this review process by adding the committee submission requirement and the six-month deadline which combined with the one-house veto to guarantee that the members of Congress who had charted the path of airline deregulation could actively guide development of the EPP.

85-920

No. 85-

Supreme Court, U.S.
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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TABLE OF CONTENTS

	Page
A. Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit	1a
B. Opinion of the United States District Court for the District of Columbia	30a
C. Constitutional Provisions, Statutes and Regulations Involved	38a
D. Petitioners' Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates, Pursuant to Supreme Court Rule 28.1	63a

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5442, 84-5467, 84-5468 and 84-5470

ALASKA AIRLINES, INC., *et al.*,

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,

v.

BROTHERHOOD of RAILWAY and AIRLINE CLERKS, *et al.*,
Appellants.

ALASKA AIRLINES, INC., *et al.*,

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,
ASSOCIATION OF FLIGHT ATTENDANTS,
Appellant.

ALASKA AIRLINES, INC., *et al.*,

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellant.

ALASKA AIRLINES, INC., *et al.*

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,

Appellants,

AIR LINE PILOTS ASSOCIATION, *et al.*

Argued March 28, 1985

Decided July 16, 1985

Before TAMM, GINSBURG and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.

Statement concurring in the judgment filed by Circuit Judge GINSBURG.

STARR, Circuit Judge.

This case raises a question left in the wake of *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), invalidating as violative of separation of powers principles the device of the legislative veto of administrative regulations. The context is Congress' pre-*Chadha* deregulation of the airline industry. The specific issue is whether an unconstitutional legislative veto provision contained in section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f), 92 Stat. 1705, 1750 (1978), is severable from the remainder of the airline employee protection provisions of that statute. We conclude that the veto provision should be severed; we therefore reverse the judgment of the District Court, 594 F. Supp. 92, which held the veto provision inseverable. Inasmuch as the District

Court did not have occasion to address the other issues raised by the airlines, we remand the case for further consideration.

I

The Airline Deregulation Act of 1978 contains an employee protection program for the benefit of employees displaced through the impact of deregulation on the shifting fortunes of individual air carriers. *See id.* § 43 at 92 Stat. 1750, *codified at* 49 U.S.C. app. § 1552 (1982). As originally crafted, the program contained two prongs. The first provided monetary support and assistance in relocation to individuals who had lost their employment or suffered a diminution in compensation as a result of a qualifying industry dislocation. *See* 49 U.S.C. app. § 1552(a)-(c). While that provision is still on the books, Congress has never funded its implementation; inasmuch as that provision's operation was expressly made subject to Congress' appropriation of funds for financial assistance, *see* 49 U.S.C. app. § 1552(a), this portion of the employee protection program is inoperative and, accordingly, no implementing regulations have been promulgated under it.

The employee protection program's second prong triggered the litigation now before us. That portion consists of a "first hire" requirement. That is to say, a person who had been employed for at least four years prior to October 24, 1978 (the effective date of the Act) by an air carrier holding a certificate under the pre-deregulation regime and who was furloughed or terminated (other than for cause) prior to the Act's effective date had a first right of hire by other pre-deregulation certificated air carriers. *See* 49 U.S.C. app. § 1552(d), (h)(1). This right of first hire was without regard to age but applied only to airlines hiring within the individual's occupational specialty; moreover, airlines could lawfully recall their own furloughed employees before hiring those displaced from other carriers. *See* 49 U.S.C. app. § 1552(d).

The Secretary of Labor was granted authority to issue, amend and repeal rules and regulations necessary to administer the employee protection plan. *See* 49 U.S.C. app. § 1552(f)(1), (h)(3). However, that authority was limited by the following provisions:

> The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both House stating that the Congress approves of them.

49 U.S.C. app. § 1552(f)(3). Exceptionally, this section combines the "report and wait" provision (found in the first sentence of the quoted language) with a one-House legislative veto[1] (set forth in the second sentence).

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[1] Justice White's dissent in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), summarizes the history of the implementation of the legislative veto. *See id.* at 968-74, 103 S.Ct. at 2793-96 (White, J., dissenting). He traces that history from its American genesis in the reorganization provisions of Pub.L. No. 72-212, 47 Stat. 382, 413-15 (1932), through its inclusion "in nearly 200 statutes . . . in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy." *Id.* at 968, 103 S.Ct. at 2793. Earlier use of the device, dating back to the Nineteenth Century, is found in English

Pursuant to his statutory authority, the Secretary of Labor published regulations for the administration of both prongs of the protection plan in March 1979. *See* 44 Fed. Reg. 19,146 (1979). A revision of the proposed regulations, covering only the first hire provisions, was published in September 1982. *See* 47 Fed. Reg. 41,304 (1982). Final regulations were published on November 22, 1983, *see* 48 Fed. Reg. 52,854 (1983), were duly transmitted to Congress, and were to become effective after sixty legislative days.

In February 1984, however, before the regulations became effective, Alaska Airlines, Inc. and various other airlines filed a complaint in United States District Court for the District of Columbia. They alleged that the first hire provisions of the Act were invalid because of the inclusion of an unconstitutional legislative veto in section 43(f)(3). In addition, they challenged the regulations themselves as violative of the Due Process Clause and, on nonconstitutional grounds, as arbitrary and capricious, an abuse of agency discretion and otherwise not in accordance with law. The Department of Labor conceded below, *see Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 94 (D.D.C. 1984), and does not contest here, that the legislative veto provision is unconstitutional under *Chadha*. The Government argued, however, that the invalid veto provision is severable from the remainder of the Act and that the remainder of the employee protection plan, and the rules and regulations adopted thereunder, are lawful and valid.

Plaintiffs-appellees moved for summary judgment, and the Department of Labor moved to dismiss or for an order affirming the validity of the regulations. On May 17, 1984, the day the regulations were to become effective, the

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administrative law. *See* Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO.WASH.L.REV. 351, 359 (1978).

District Court granted the airlines' motion, holding that section 43 was invalid in its entirety due to the inclusion of what the court deemed to be an inseverable legislative veto provision. The court's opinion issued the following day. Neither the order nor the opinion addressed the other issues raised in the airlines' complaint.

II

Before reaching the principal issue presented on this appeal, namely the severability of the legislative veto from the remainder of section 43 of the Airline Deregulation Act, several preliminary issues must be addressed.

A

The first question is whether we have jurisdiction over this appeal. The issue is raised only in a footnote in the Alaska Airlines Brief, *see* Appellees' Brief at 9 n.*, where appellees question, in passing, whether jurisdiction in fact lies in this court; because of the obvious importance of that question, the subject merits our analysis at the outset. A basic jurisdictional provision of Title 28 is that the Supreme Court, not the Courts of Appeals, is vested with jurisdiction over appeals from District Court decisions holding an Act of Congress unconstitutional in any civil action in which the United States, or an agency, official or employee thereof, is a party. 28 U.S.C. § 1252 (1982). In keeping with this provision, the several Courts of Appeals enjoy jurisdiction over appeals from final decisions of the district courts "*except* where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1982) (emphasis added). The airlines suggest that since the District Court held the entire section unconstitutional, exclusive review of that judgment should lie in the Supreme Court.

Those two Title 28 provisions might be read to support the airlines' position. In fact, the appeal in this action

was originally filed in the Supreme Court, but due to a recent Supreme Court decision was thereafter refiled in this court. *See* Appellant Secretary of Labor's Brief at 10 n. 5. To determine whether the shift in tribunals was proper and jurisdiction actually lies here we examine that recent Supreme Court disposition.

In *Equal Employment Opportunity Commission v. Allstate Insurance Co.*, —— U.S. ——, 104 S.Ct. 3499, 82 L.Ed.2d 810 (1984), the Court, by order, held that it had no jurisdiction in a legislative veto case. The obvious difficulty in analyzing the Supreme Court's decision in *Allstate* is that the dismissal for lack of jurisdiction was without opinion. There was, however, a dissent by the Chief Justice, joined by Justice O'Connor, which presents at least two Justices' view of the Court's reasoning. The district court in that case, 570 F. Supp. 1224 (S.D. Miss. 1983), had held the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (1977), unconstitutional because of the presence of a non-severable legislative veto provision. That statute contained the provision pursuant to which the Equal Employment Opportunity Commission had been authorized to enforce the Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963). After ruling that the Reorganization Act failed in its entirety, the court held that the EEOC lacked authority to enforce the Equal Pay Act and granted summary judgment in favor of Allstate.[2]

An appeal thereafter taken directly to the Supreme Court was summarily dismissed for want of jurisdiction. Appearing to find the Court's approach overbroad, the Chief Justice stated:

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[2] After the district court decision in *EEOC v. Allstate*, but before the Supreme Court's consideration, the Fifth Circuit held, in a separate case, that the legislative veto in the Reorganization Act was severable and that the EEOC did have authority to enforce the Equal Pay Act. *See Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

> Had the District Court simply determined, as a matter of statutory construction, that appellant cannot exercise the authority to enforce the Equal Pay Act because Congress did not wish the Act to be operative absent the veto provision, I would agree that dismissal would clearly be compelled under *Heckler v. Edwards* [—— U.S. ——, 104 S.Ct. 1532, 79 L.Ed.2d 878 (1984)]. Under these circumstances, it would be clear, as in *Heckler*, that appellant was not challenging the constitutional holding of the District Court since it concedes the validity of the court's holding on the legislative veto provision. But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and implicitly by the Court, that the holding was in reality one of statutory construction cannot change the fact that the District Court explicitly and unambiguously held the entire Act *unconstitutional.*

Allstate, supra, 104 S.Ct. at 3502 (emphasis in original).

Using this explanation as guidance to the Court's position on the jurisdictional issue, it appears that the appeal in the case at hand appropriately lies in this court. The District Court here did not break any new ground with respect to a constitutional issue. To the contrary, its decision that the legislative veto provision was unconstitutional was squarely rooted in *Chadha*, as evidenced by the fact that neither side contests that portion of the District Court's decision. Thus, the constitutional decision is, in truth, not a part of this appeal. What is at issue on appeal, rather, is the severability *vel non* of the remainder of the section in which the legislative veto appears. That question, as we shall see, reduces to a matter of statutory interpretation, *see generally* Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 115 (1937). As even the *Allstate* dissenters opined, jurisdiction would not under those circumstances lie in the Supreme Court but would instead be vested in this

court. *See also Heckler v. Edwards*, *supra*, 104 S.Ct. at 1536 ("a party does not have a right to direct review in the Supreme Court under 28 U.S.C. § 1252 unless the holding of federal statutory unconstitutionality is in issue"). Accordingly, we are persuaded that the present appeal is properly before us.

B

The second preliminary issue is whether this dispute is ripe for review, inasmuch as Congress has not attempted to exercise the legislative-veto power purportedly conferred by the Airline Deregulation Act. In a case suggesting the possibility of a lack of ripeness, *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977), this court in a pre-*Chadha* ruling stated that "[u]ntil Congress exercises the one-house veto, it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify judicial resolution of the pervasive constitutional issue which the one-house veto provision involves." *Id.* at 649. However, this court also stated, importantly for our purposes, that "[a] contention that there are no real considerations of ripeness here can only rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of the court." *Id.* at 649 n. 8. This court, at that time, was unwilling to deem the legislative veto device patently unconstitutional; however, in *Chadha*'s wake, this sort of veto provision is manifestly unconstitutional, and thus under *Clark v. Valeo*'s teaching the issue before us may well be ripe for adjudication.

On the other hand, the proposition that the issue is not ripe finds its strongest support in a decision from another circuit, *Muller Optical Co. v. Equal Employment Opportunity Commission*, 743 F.2d 380 (6th Cir. 1984). In that case, the legislative veto provision of the Reorganization Act of 1977 was once again in issue. The Sixth Circuit

concluded that "the existence of a one-House veto provision in a statute does not render the statute invalid but only renders the act of Congress, if it attempts to exercise its one-House veto[,] invalid . . . ." *Id.* at 388. The Reorganization Plan No. 1 of 1978, which transferred authority to the EEOC to enforce the Age Discrimination in Employment Act, *see infra* note 5, had long since been reviewed by Congress, and Congress had chosen not to exercise its legislative veto. The court stated:

> To inquire at this point in time whether Congress would have passed the Reorganizational [sic] Act without the one-House veto provision and, thereby, whether the substantive provisions of the Act are effective absent the provision, makes no sense when Congress has already declined to use the veto provision and thus has already approved the plan.

Id.

In *Mu'ler*, the Reorganization Plan in question was promulgated, and Congress elected not to veto it, prior to *Chadha*. Congress thus tacitly approved the plan, thereby strengthening the argument that the constitutionality *vel non* of the unutilized veto provision should not have been adjudicated. Here, however, the Department of Labor promulgated its regulations after *Chadha* was handed down. At that point, Congress did not, in truth, enjoy the option of vetoing the rules; indeed, to have attempted to do so, in light of *Chadha*, would have been an exercise in futility. Hence, the Congressional approval found tacitly in *Muller* cannot, in reason, be read into the situation at hand. In the post-*Chadha* era in which Congress knows that it may not lawfully exercise the purported veto authority, to hold that a court cannot reach the issue of the constitutionality of such a device unless Congress has exercised the provision would be, in effect, to shield all agency action from review as to whether Congress would have provided the underlying authority without its veto oversight. This we decline to do.

C

The final preliminary question is whether *Chadha* should be applied retroactively. The test for retroactivity of a judicial decision is laid out in *Northern Pipeline Constructon Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). *Northern Pipeline* states that there are

> three considerations . . . properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, . . . second, "whether retrospective operation will further or retard [the] operation" of the holding in question, . . . and third, whether retroactive application "could produce substantial inequitable results" in individual cases . . . .

Northern Pipeline, supra, 458 U.S. at 88, 102 S.Ct. at 2880 (quoting *Chevron, supra*, 404 U.S. at 106-07, 92 S.Ct. at 355).

With regard to the first factor, the Association of Flight Attendants argues before us that *Chadha* erected a new principle of law that could not reasonably have been anticipated. In response, the airlines point to fifty years of political and scholarly debate and speculation as to the constitutionality of such provisions; over the years various commentators have questioned the constitutionality of the legislative veto device,[3] while others have rushed

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[3] *See, e.g.*, Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV.L.REV. 569 (1953); Dixon, *The Congressional Veto and Separation of Powers: The Executives on a Leash*, 56 N.C.L.REV. 423 (1978); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA.L.REV. 253 (1982). For a more complete compilation, see *Chadha, supra*, 462 U.S. at 976 n. 12, 103 S.Ct. at 2797 n. 12 (White, J., dissenting).

to its defense.[4] Furthermore, this court in *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402, 77 L.Ed.2d 1403, 77 L.Ed.2d 1413 (1983), held prior to *Chadha* that the legislative veto provision of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978), was unconstitutional. In view of all this, at the very least, some considerable doubt had been raised prior to *Chadha* with respect to the constitutionality of legislative veto provisions.

The second factor, the furtherance or retarding of the decision's operation, speaks more strongly in favor of *Chadha*'s retroactive application. That decision, of course, pertained to a bedrock issue of the structure of the National Government, namely the separation of powers enshrined by the Framers in Philadelphia in the summer of 1787. The fundamental concern over fidelity to that principle of governance of a free people would scarcely be furthered by shielding from challenge a separation-of-powers violation simply by virtue of the fact that the unconstitutional provision was passed prior to *Chadha*. While it may be argued that regulations promulgated and not vetoed (or even promulgated but vetoed) prior to *Chadha* should not be subjected to retroactive application, it seems strained to argue that the provision itself should be protected from *Chadha*'s retroactive application. The veto device works a potential violation of separation of powers principles; that provision indisputably ripens into a very real violation when regulations are purportedly vetoed.

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[4] *See, e.g.*, Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF.L.REV. 565 (1953); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO.WASH.L.REV. 467 (1962). For a more complete compilation, see *Chadha, supra*, 462 U.S. at 976 n. 12, 103 S.Ct. at 2797 n. 12 (White, J., dissenting).

An alternative problem arises in this post-*Chadha* day and age in which Congress is plainly forbidden from exercising a veto. If we refuse to apply *Chadha* to the post-*Chadha* adoption of regulations under a pre-*Chadha* statute that includes a legislative veto, the Executive branch might thereby be permitted to exercise power that Congress would not have delegated had it not retained some power of review through the legislative veto device. In short, while the second factor might shield from retroactive application those regulations fully in place prior to *Chadha*, that factor should not shield the legislative veto provisions themselves from constitutional scrutiny.

The third factor, substantial inequitable results from retroactive application, weighs heavily on neither side. The Association of Flight Attendants argues that great inequity would result from *Chadha*'s retroactive application in that employees would no longer enjoy the protective mechanisms carefully crafted by a Congress which recognized "an almost moral obligation" to protect airline employees. *See* Association of Flight Attendants' Brief at 41. However, whatever inequity the flight attendants may discern arises not entirely from the retroactive application of *Chadha* but, more precisely, from any judicial decision not to sever the remainder of section 43. Their arguments speaks to the Congressional intent important to the severance decision; they do not speak to the retroactivity *vel non of Chadha*.

There is, as yet, little case law on *Chadha's* retroactive application.[5] Three pre-*Chadha* cases in this circuit struck

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[5] The issue was raised in one case in the D.C. District Court, and the court there held that under a case-by-case analysis *Chadha* would apply retroactively to the Presidential Recordings and Materials Preservation Act, Pub.L. No. 93-526, 88 Stat. 1695 (1974). *See Allen v. Carmen*, 578 F.Supp. 951, 966-68 (D.D.C. 1983). The Temporary Emergency Court of Appeals has also considered the question. In *Exxon Corp. v. United States Department of Energy*, 744 F.2d 98 (T.E.C.A.), *cert. denied*, —— U.S. ——, 105 S.Ct. 576, 83 L.Ed.2d 515 (1984), the court held that *Chadha* should not be

down legislative veto provisions as unconstitutional, *see Amercan Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982); *Consumers Union of the United States, Inc. v. Federal Trade Commission*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumer Group v. Consumer Energy Council of America*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402, 77 L.Ed.2d 1403, 77 L.Ed.2d 1413 (1983); *Consumer Energy Council of America v. FERC*, *supra*, 673 F.2d 425. Inasmuch as all three decisions were pre-*Chadha*, they are not of direct relevance to the issue of the retroactivity of *Chadha*. Furthermore, while *Pierce* relies on *Consumer Energy Council* and *Consumers Union*, the veto clause found unconstitutional in *Pierce* was enacted after this court's decision in *Consumer Energy Council*, hence the reliance on *Consumer Energy Council* was not a retroactive application. On the other hand, the Supreme Court's summary affirmance of *Consumers Union* and

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applied retroactively. But, the retroactive application under discussion was as to obligations imposed by, and regulations adopted pursuant to, the infirm statutes prior to *Chadha*. The court found substantial inequitable results in voiding such obligations and regulations. In our view, this analysis should not be extended to the case at hand in which the regulations were adopted post-*Chadha*. Other cases do not directly address the issue. For example, in *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984), the legislative veto provision of the Reorganization Act of 1977, Pub.L. No. 95-17, 91 Stat. 29 (1977), was held unconstitutional, but the provision was ruled severable; thus, the issue of retroactive application *vel non* lost any importance. In *Equal Employment Opportunity Commission v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), the Second Circuit reached the opposite conclusion on severability of this provision. The entire Reorganization Act was held unconstitutional and the EEOC was found to have no authority to enforce the Age Discrimination in Employment Act ("ADEA"), Pub.L. No. 90-202, 81 Stat. 602 (1967). Having reached that conclusion, the court did discuss retroactivity, but it was the retroactivity of its ruling regarding the ADEA. The retroactivity of the *Chadha* decision must have been assumed, however, inasmuch as the Second Circuit ultimately concluded that the EEOC was lacking in authority.

Consumer Energy Council was rendered after *Chadha*. That summary disposition, while obviously enjoying less precedential signficance than a case afforded plenary consideration, *see, e.g., Mandel v. Bradley*, 432 U.S. 173, 176-77 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 391-92, 95 S.Ct. 533, 540-41, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring), might be viewed as assuming *Chadha*'s retroactive application.

The airlines advance one additional argument in favor of retroactive application. They note observations in both Justice Powell's concurrence in *Chadha, supra*, 462 U.S. at 959, 103 S.Ct. at 2788 ("The Court's decision . . . apparently will invalidate every use of the legislative veto.") (Powell, J., concurring), and Justice White's dissent, *id.* at 967, 103 S.Ct. at 2792 ("Today the Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.' ") (White, J., dissenting), that the Court's ruling would invalidate all legislative veto provisions. The airlines emphasize that the opinion of the Court did not respond to these observations, while it did respond to others offered by the dissent; the airlines draw from this an indication that the Court has indicated that *Chadha* should have retroactive effect. This is a weak reed on which to rest. Failure to respond to these comments is, at bottom, probative of nothing. Nonetheless, when all is said and done, we agree, by virtue of the analysis previously set forth, that *Chadha* should be given retroactive effect.

II

Having disposed of these preliminary inquiries, we turn now to the question of the severability *vel non* of the remainder of section 43 from the unconstitutional legislative veto provision.[6] Since it is, of course, a veto provision

[6] For an excellent, early treatment of the Supreme Court's development of severability analysis, see Robert Stern's article of almost a half century ago, *Separability and Separability Clauses in the Supreme Court*, 51 HARV.L.REV. 76 (1937).

whose severability is in question, the severability analysis set forth in *Chadha* itself is particularly instructive for us. In *Chadha*, the Court stated that "the invalid portions of a statute are to be severed ' "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." ' " *Chadha, supra*, 462 U.S. at 931-32, 103 S.Ct. at 2774 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932)). "A provision is further presumed severable if what remains after severance 'is fully operable as a law.' " *Chadha, supra*, 462 U.S. at 934, 103 S.Ct. at 2775 (quoting *Champlin, supra*, 286 U.S. at 234, 52 S.Ct. at 564). While the immigration statute at issue in *Chadha* contained a severability clause, thus distinguishing it from the Airline Deregulation Act before us,[7] the analyti-

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[7] It is not clear what weight is to be given to the absence of a severability clause.

> The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability. When there is no such clause, however, as in this case, the test is less certain.

Consumer Energy Council of America v. FERC, supra, 673 F.2d at 441 (footnote omitted).

Here, even less weight is merited than might ordinarily be attributed to such an absence. Several of the appellants argue that section 43 of the Airline Deregulation Act amended the Federal Aviation Act, Pub.L. No. 85-726, 72 Stat. 731 (1958), a statute already containing a severability clause, *see* 49 U.S.C. app. § 1301 note (1982). *See* Brief of Appellants Brotherhood of Railway and Airline Clerks, Flight Engineers' International Association, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America at 12-13. Appellees retort that while section 43 of the ADA is codified along with the Federal Aviation Act, the "[s]ection was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation

cal framework enunciated by *Chadha* applies to the severability issue which we are called upon to resolve.

Chadha presumes severability of the offensive provision if what remains after severance is fully operable as law. To this end, the burden is placed squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision without the severed portion.[8] This presumption articulated by *Chadha* was echoed in a later Supreme Court severability case: "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears

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Act of 1958 which comprises this chapter," 49 U.S.C. app. § 1552 note (1982). They contend that the severability clause thus does not encompass section 43. *See* Appellees' Brief at 16 n.*.

The Airline Deregulation Act is, by its own terms, an act to amend the Federal Aviation Act. *See* Pub.L. No. 95-504, 92 Stat. 1705, 1705 (1978). Many provisions of the ADA do, in fact, specifically amend provisions of the Federal Aviation Act, while section 43 does not. It is, instead, simply a provision added to the U.S. Code. Whether the severability clause of the Federal Aviation Act carries over to section 43 is thus unclear. We do not resolve that question, but note only that the point may not have been clear to Congress that it was not so included; we will thus not read any legislative intent into the absence of an *additional* severability clause specifically encompassing section 43.

[8] This court has held the presumpytion to be unimportant in a pre-*Chadha* legislative veto severability case. *See Consumer Energy Council of America v. FERC*, *supra*, 673 F.2d at 442 ("We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. . . . We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry."). Since the *Consumer Energy* court found the provision severable, its holding is not at odds with later Supreme Court opinions. Furthermore, the court was focusing on what presumption should be derived from the absence of a severability clause. The conclusion that no presumption was to be drawn from that particular fact may not have been applicable to the general presumption in favor of severability.

is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984). The Court has thus clearly laid down a presumption in favor of severability if what remains is operative as law; in a word, severance lies unless it is "evident" that what remains would not have been enacted.

Our charge is to save as much of the statute as we can,[9] consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall. The issue cannot be whether Congress preferred the statute with the unconstitutional provision over the same statute without that provision. Manifestly, Congress' preference is abundantly clear from its inclusion of the unconstitutional provision. Nor is the question whether Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision. That is, "the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), *cert. denied*, —— U.S. ——, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984).

Section 43 of the ADA is an extensive and elaborate provision, yet only one part of one subsection, namely section 43(f)(3), is unconstitutional under *Chadha*. That

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[9] "The cardinal principle of statutory construction is to save and not to destroy.'" *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971) (plurality opinion) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)).

section, codified at 49 U.S.C. app. § 1552(f)(3), contains two provisions, as we have seen. The first, the so-called "report and wait" provision, is left unaffected in *Chadha*'s wake; the second is, of course, the legislative veto provision constitutionally eviscerated by *Chadha*. If the veto provision were severed, the remainder of the section (including the first sentence of the subsection) would be fully operable as law. The employee protection program would still be spelled out in great detail, and the Secretary of Labor would still retain authority to promulgate the necessary rules and regulations. The sole difference would be that the Secretary would be required only to submit the rules and regulations to the appropriate Congressional committees on a "report and wait" basis rather than expose those regulations to the gauntlet of possible invalidation by way of an exercise of the purported veto authority.

To overcome the presumption of severability with respect to this provision, the airlines must show, as we have seen, that it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality. Or, as the Temporary Emergency Court of Appeals would put it, the challengers must show that it is evident that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision. Not only is evidence for that position lacking, what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection; in contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision. That is to say, the evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan. It is to that evidence that we now turn.

The employee protection provisions contained in the Airline Deregulation Act had their genesis in the Senate bill. The Senate Report is thus particularly instructive as to the importance Congress attributed to that program. Noting the concern expressed by airline employees over the security of their jobs once deregulation was effected, the Senate Report stated:

> The Committee felt that this concern [of airline employees] should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past. . . . The Committee believes that the Congress . . . must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong., 2d Sess. 113-14 (1978). To that end, the Senate bill, S. 2493, included an employee protection program very much like the regime that was ultimately adopted. *See* Conference Report, H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978), U.S. Code Cong. & Admin. News 1978, pp. 3737, 3813 (observing that the Conference substitute was "basically the same as the Senate bill" with certain stated exceptions, including some reworking of the subsection containing the veto provision).

The House bill, H.R. 12611, also contained an employee protection program. As explained by the House Report:

> The bill stipulate[d] that no authority granted by th[e] act shall be exercised by any carrier unless

> the Secretary of Labor has certified to the CAB that interests of employees have been adequately protected by fair and equitable arrangements, with benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act.

H.R. Rep. No. 1211, 95th Cong., 2d Sess. 26 (1978), U.S. Code Cong. & Admin. News 1978, pp. 3737, 3762. That this provision was viewed both as an important feature of the bill and as being stronger than the Senate plan is evidenced in the various comments disparaging the perceived reduction in protection resulting from the Conference substitute.[10]

The airlines argue, however, that "Congress was uncertain about the need for additional labor protection beyond that already available through the CAB." Appellees' Brief at 41. This is quite true. Indeed, statements in the legislative history reasonably can be read as evidencing a sense that employee protection was not in fact vital to the crafting of a comprehensive deregulatory regime. Those statements stemmed not from legislative oversight or, worse yet, callousness to the potential plight of displaced workers, but reflected, rather, the

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[10] *See* 124 Cong.Rec. 38,522 (1978) (statement of Rep. Anderson) ("The House provisions on employee protection . . . were stronger than those in the conference bill."); 124 Cong.Rec. 38,523 (1978) (statement of Rep. Harsha) ("I am not totally satisfied with the conference agreement on the provision for employee protection. . . . [B]enefits are not to be paid . . . until there is at least 7½ percent employee reduction in the airline. It makes no sense to me to defer these benefits until this percentage trigger is reached. . . . However, in the spirit of compromise we managed to reduce by one-half the percentage trigger contained in the Senate bill."); 124 Cong.Rec. 38,524-25 (1978) (statement of Rep. Mineta) ("I am . . . compelled to rise to express my grave concern about the employee protection program included in [the ADA]. . . . By comparison with the House-passed provision, the conference agreement—which was based on the Senate language—is not much protection at all.").

sincerely held belief in various legislative quarters that loss of employment in a deregulated industry was unlikely.[11] While that sentiment is certainly present in the debate, as the airlines correctly and understandably emphasize, the sentiment does not, upon analysis, truly speak to the precise issue at hand. For, inherent in notion of increased competition in the industry is the reality that some carriers will likely lose business, while other carriers will gain. Thus, in Congress' view at the time, while total employment within the industry, once deregulated, might well remain stable or grow, individual employees might nonetheless lose their jobs due to deregulation; and, on the other hand, jobs with other carriers would likely become available. The preferred hiring status provisions fashioned by Congress would thus move those employees who lost their jobs into the newly opened or created positions.

In our view, legislative comments with respect to the overall employment picture within the industry speak more to the provision for payment of benefits from federal coffers than to the first hire provisions. Congress deemed it unlikely that the former provision would, in fact, come into play; that sense of the National Legislature is eloquently evidenced by the fact that Congress to

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[11] *See* S.REP. No. 631, 95th Cong., 2d Sess. 119 (1978) ("it is highly unlikely that such payments [by the Government to displace employees] will ever be necessary"); 124 Cong.Rec. 37,417 (1978) (statement of Sen. Pearson) ("Some say that the bill may have a harmful effect on labor while others argue to the contrary. I believe that this legislation will be good for labor, management, and the investor."); 124 Cong.Rec. 37,419 (1978) (statement of Sen. Kennedy) ("the indicators are all positive, and employment will continue to increase as the carriers respond to the changes and new opportunities deregulation has brought"). *But see* S.REP. No. 631, 95th Cong., 2d Sess. 221 (1978) (Minority view of Sen. Inouye) ("That supporters of the legislation recognize the very real possibility of these consequences [loss of jobs for airline personnel and support workers] is . . . evidenced by adoption in Committee of an 'employee protection' amendment.").

this day has not funded that program. These comments thus do not speak, as the airlines would read them, to the "first hire" provisions. Indeed, the "first hire" provisions could, in theory, play a constructive fiscal role in keeping potentially costly federal relief provisions from being triggered in the first instance. These comments, then, do nothing to counter the evidence that Congress placed great importance on the existence of the employee protection plan as an integral part of a comprehensive deregulatory regime.

In stark contrast to the numerous comments indicating the importance of the employee protection plan, the only discussion cited by the parties with respect to the veto provision is a solitary comment by then-Representative Elliott Levitas of Georgia expressing approval of the presence of a legislative veto in the provision.[12] Not only is this sole source a thin reed for eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees but, what is more, Rep. Levitas was a vigorous advocate generally for the proposition, eviscerated by *Chadha*, that Congress must retain control over administrative agencies via the legislative veto device.[13] Now to be sure, Rep.

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[12] I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on regulations that will have the effect of law.

124 Cong.Rec. 38,524 (1978) (statement of Rep. Levitas). By his own description, Rep. Levitas was "making [an] observation," *id.*, not setting forth what he was maintaining to be an indispensable legislative ingredient of an acceptable bill.

[13] In a post-*Chadha* article, then-Representative Levitas and his co-author, former counsel to the House of Representatives, Stanley M. Brand, stated:

> As Congress increasingly delegated authority, the bureaucratic agencies . . . swelled in number and in the size of their

Levitas was, as the airlines rightly emphasize, a member of the Conference Committee for the Airline Deregulation Act and of the House Committee on Public Works and Transportation, the committee to which the House bill was referred. Thus, his statement was not one merely of a zealous advocate championing his well-known position in favor of lavishly sprinkling regulatory (or deregulatory) legislation with legislative veto devices. However, there is not a shred of evidence that Rep. Levitas' statement represented the view of Congress as a whole (or even his full Committee), nor is there any indication that Congressman Levitas himself attached especial significance to this particular veto provision, as opposed to his keen interest generally in seeing the incorporation of such devices in legislation enacted by the Congress.

Failing to find any direct statement evidencing a Congressional intent of inseverability, appellees advance various items of circumstantial evidence of what they

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personnel. These agencies were given the authority to write rules and regulations that govern our society with the same force and effect as the laws written by the elected Congress. In order to maintain its control over this authority, Congress often—though not often enough in our opinion and in the opinion of others—required that these rules and regulations be subjected to congressional review, and if the Congress deemed appropriate, a legislative veto.

* * * *

Under our system of government, which is based on democratic principles, those who are accountable to the people must have the final say over the rules and regulations that have the force and effect of law. If Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of the law, then *the Congress* ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that.

Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 HOFSTRA L.REV. 593, 611-12 (1984) (emphasis in original).

perceive to be such an intent. Appellees first point to the fact that only section 43 of the Act is subject to the veto provision. That fact, however, is hardly surprising. The Act was, of course, a deregulatory statute, as its very name suggests, whereas section 43 was, for lack of a better term, a regulatory provision. It is, as a matter of common sense, the regulatory provision which would be the most likely candidate for inclusion of a legislative veto device. That fact, however, still does not speak to whether Congress would have preferred no employee protection plan at all, as opposed to a plan containing a "report and wait" mechanism but lacking a veto provision.

The airlines also argue that the legislative veto provision in section 43 is "distinctive among the almost 200 legislative veto provisions which Congress has included in federal statutes." Appellees' Brief at 22. Admittedly, the provision reflects, as a whole, a unique combination of features. For one thing, as we have seen, a "report and wait" requirement exists alongside the veto, *see* 49 U.S.C. app. § 1552(f)(3); in addition, a requirement is imposed upon the Secretary of Labor to promulgate rules and regulations necessary to carry out the section within six months after October 24, 1978, *see* 49 U.S.C. app. § 1552(f)(2). It is not clear to us that anything of decisional import is to be drawn from the inclusion of these features.

The "report and wait" requirement simply directs the submission of rules and regulations, prior to issuance as final rules, to particular oversight committees of Congress. This mechanism may reasonably be viewed as the assertion of an interest by committees not normally charged with the review of labor regulations but directly concerned with the airline industry over labor regulations affecting deregulation of that industry. This understandable interest does not indicate that the veto is inseverable, particularly since the "report and wait" clause remains inviolate notwithstanding *Chadha*.

Neither is it clear what conclusion is to be drawn from the six-month requirement imposed on the Secretary. The airlines suggest that this subsection was designed to insure that the regulations would be reviewed by essentially the same members of Congress who had shaped the Airline Deregulation Act. While an election would have intervened between the passage of the Act and the required time of submission, the historical experience of reelections of incumbents might presumably lend some credence to this interpretation. Nonetheless, like election predictions, this approach is all purely speculative. The provision could just as readily be seen in an indication of the high importance Congress attached to the employee protection plan, which Congress therefore mandated be implemented as quickly as possible. Furthermore, even assuming *arguendo* appellees' point, that view fails, at bottom, to speak to the issue at hand. From it, we cannot conclude that Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision.

Appellees also seek support in the treatment of the veto provision, and the protection plan as a whole, in the deliberations of the Conference Committee. They argue that

> the House accepted the Senate's novel concept of an [employee protection plan] that it had not theretofore embraced, but only with a significantly strengthened legislative review provision. The terms of this compromise constitute strong evidence of nonseverability because, as in [*American Federation of Government Employees v. Pierce*, *supra*], one house accepted the overall thrust of the other house's conflicting legislation, but only with the veto-related restrictions incorporated.

Appellees' Brief at 33 (footnote omitted). The airlines thus argue that the decision here should be influenced by our decision in *Pierce*, a case in which a veto provision

was held inseverable. However, *Pierce* is readily distinguishable from the case at hand. *Pierce* concerned a provision of an appropriations act for the Department of Housing and Urban Development, Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982), which provided that funds could not be used for any reorganization by HUD, prior to January 1, 1983, without prior approval of the two Appropriations Committees. The district court had assumed the invalidity of the approval clause and severed it from the remainder of the provision. This court reversed, finding intent of nonseverability. However, as we shall now see, the Conference Committee compromise providing the evidence of inseverability in *Pierce* differed totally from the compromise reached in conference with respect to the Airline Deregulation Act.

In *Pierce*, the House had "never put forward a provision without a committee approval clause tied to it." *Pierce, supra*, 697 F.2d at 307. On the other hand, "the Senate initially opposed any restraint on the Department . . . [and] the Senate Committee[] clearly expressed reservation about the House version of the bill." *Id.* The Conference Committee compromise gave control to the Appropriations Committees, but only for a limited duration. Neither House, it was abundantly clear in *Pierce*, would have accepted a complete ban on reorganizing HUD—yet that is precisely the result severance would have brought about.

The Conference Committee compromise reached here bears no resemblance at all to the situation in *Pierce*. As to the airline deregulation bill, the Conference adopted, for the most part, the Senate bill's employee protection plan. That plan contained a veto clause, to which the Conference Committee added the "report and wait" provision. Even if the "report and wait" provision may be viewed as designed to strengthen the legislative veto provision, we have found no evidence that the

House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device. In fact, the House's protection plan was viewed, at least by several Representatives, as being much stronger than the Senate's plan. *See supra* note 10. It seems to us unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy. Nor have we found any indication that the Senate's agreement to the minor modifications in its version of the plan was premised on a "strengthening" of the veto provision. In short, we conclude that *Pierce* is wholly inapposite to the case at hand.

III

We emerge from our trek through the legislative history of the Airline Deregulation Act far short of the destination that must be reached for the airlines to prevail. We fail to find satisfied here the exacting inseverability standard that it be "evident" that Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision. Ample evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

In sum, we hold the legislative veto provision here to be severable from the remainder of the employee protection provisions; the remainder of section 43 therefore remains viable. However, since the District Court did not have occasion to rule on the other grounds advanced by the airlines in their challenge to the rules adopted by the Secretary, the case is remanded to that court for consideration and adjudication of those issues.

Reversed and remanded.

GINSBURG, Circuit Judge, concurring in the judgment.

The court's intricate discussion of preliminary issues seems to me distracting. As I view this case, only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions. Before the district court, the Department conceded the unconstitutionality of the veto, and does not contest that matter here. Therefore, we face no appeal from decision of a constitutional question; instead, a ripe statutory interpretation controversy—a construction of legislation dispute securely within our appellate jurisdiction—is before us. Furthermore, as the court recognizes, at 1558-1559 & n. 5, a ruling that the labor protective prescriptions are severable strips discourse on *Chadha's* "retroactive application" of "any importance."

On the severability question, I am in full agreement with the court's judgment, which undertakes a moderate salvage operation. Deletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress. A declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will. *Cf. Buckley v. Valeo*, 424 U.S. 1, 108-09, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (per curiam).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 84-0485

ALASKA AIRLINES, INC., *et al.*,
Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,
Defendants;

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ASSOCIATION OF FLIGHT ATTENDANTS; and BROTHERHOOD OF RAILWAY and AIRLINE CLERKS, ETC.,
Intervening Defendants.

May 18, 1984

MEMORANDUM

GESELL, District Judge.

This case challenges the validity of § 43 of the Airline Deregulation Act (ADA), Pub.L. No. 95-504, 92 Stat. 1705 (1978), as well as the validity of regulation implementing § 43. The federal government undertook extensive control over commercial airline operations beginning in the 1930's. The Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, granted to the Civil Aeronautics Board (CAB) broad powers to regulate nearly every aspect of

the industry. This structure was dramatically altered in 1978, however, with the passage of the Airline Deregulation Act. In the sweeping provisions of this Act the CAB was directed to take steps to gradually lessen and finally abolish nearly all economic regulation of the airline industry; indeed, the Act provided for the CAB itself to go out of existence by 1985.[1]

In anticipation of the upheaval and possible economic hardship which might result from deregulation, Congress enacted as § 43 of the Act an "Employee Protection Program" (EPP). This provision had two closely linked components: an "assistance payments" program by which the Secretary of Labor, "subject to such amounts as are provided in appropriations Acts," would make monthly assistance payments to certain "protected" airline employees laid off as a result of deregulation, and a "first hire" program by which carriers certificated by the CAB as of a particular date would be required to his "protected" employees laid off by other carriers before hiring other individuals not previously furloughed by the hiring airline itself. Many aspects of these programs were left unresolved by the terms of § 43.

The Secretary of Labor was directed by § 43(f) to issue the regulations necessary to carry out the Employee Protection Program within six months, subject to legislative veto before they became effective. Despite the six-month deadline, final regulations were not proposed for the "first hire" program until 1983. Airline Employee Protection Program, 48 Fed.Reg. 52,854 (Nov. 22, 1983). These regulations are now scheduled to become effective immediately. The Secretary has yet to issue regulations covering the assistance payments program, which Congress has never funded.

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[1] ADA § 40. Certain of the CAB's functions are to be transferred to other agencies. Safety regulation, which is controlled by the Federal Aviation Administration, remains unaffected by the ADA.

Plaintiffs, fifteen airlines subject to these new regulations, challenge the validity of both the regulations and of § 43 itself. Several airline employee unions have intervened as defendants or filed briefs *amici curiae*. After full briefing and oral argument, cross-motions to dismiss or for summary judgment are now before the Court. Because the Court concludes that § 43 is unconstitutional in its entirety due to its special provision for a legislative veto, summary judgment must be granted for plaintiffs.[2]

Section 43(f) states:

> (f) Rules and Regulations.—(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.
>
> (2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after the date of enactment of this section.
>
> (3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regula-

[2] Plaintiffs' other legal contentions need not be reached.

> tions, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.
>
> (4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

As the government concedes, the legislative veto provision found in § 43(f)(3) is unconstitutional under the Supreme Court's holding in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The issue therefore is whether this defective portion of § 43 can be "severed" from the rest of that section and the remainder enforced as valid law, or whether the legislative veto provision is so fundamentally a part of that provision that it unconstitutionally infects the entire section.

The proper analysis to be followed in determining the issue of severability is well established. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may be dropped if what is left is fully operative law." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (*per curiam*), *quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932). *See also Chadha*, 103 S.Ct. at 2774. "[T]he crucial inquiry [is] whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 307 (D.C.Cir.1982), *quoting Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C.Cir.1982), *aff'd mem.*, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed. 1402 (1983).[3]

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[3] The question is not, of course, whether Congress would have enacted *some* type of employee protection plan in the absence of a

Several aspects of § 43 lead the Court to conclude that Congress considered the legislative veto provision to be integral to the EPP and that Congress would not have enacted § 43 in its present form without such a provision. First, and most significant, § 43 is the only section in the entire Airline Deregulation Act where a legislative veto provision appears. Unlike with many other statutes, the Court is faced here not with a legislative veto provision which applies to an entire statute, but with a veto provision applicable to one, and only one, particular section of a long and comprehensive piece of legislation. It is apparent from the face of the statute, therefore, that Congress enacted § 43 with the understanding firmly in mind that regulations issued by the Secretary would be subject to legislative veto.

The importance to Congress of the legislative provision of § 43 is reinforced by the language of that section. Subsections 43(f)(3) and (4) provide very explicit procedures under which proposed regulations are subject to congressional review before they can become effective. Final regulations must be submitted for review to specific congressional committees 30 days before they are issued, and once issued do not become effective until both Houses of Congress have adopted resolutions approving the regulations or 60 "legislative" days have passed without either House adopting a resolution of disapproval. These elaborate procedures are, in fact, apparently unique among the nearly 200 statutory legislative veto provisions enacted by Congress in the extent

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legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the remainder of the statute merely because it might be an approximation of what Congress would have enacted. The task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself.

to which they ensure congressional control over the regulatory process.[4]

The language of § 43's substantive provisions and the circumstances in which the ADA was enacted also support the view that Congress intended the veto provision to be integral to § 43. Both the assistance payment and first hire provisions provide the Secretary with only general guidance in determining how those programs should be structured and operated. Moreover, as the congressional debates make clear the effects of airline deregulation were highly uncertain. Congress obviously thus could not foresee the precise nature or cost of the EPP or the problems which might arise under it. Such circumstances are consistent with and reinforce indications in the language of the veto provision itself that Congress' grant of such broad authority to the Secretary was intended to be contingent on being subject to a legislative veto.

The government points out that there is relatively little discussion of the veto provision in the legislative history of the Act, at least with respect to the first hire program. The mere lack of extensive discussion of the veto provision, however, does not support the conclusion that Congress considered that provision insignificant, and what legislative history there is in fact supports the view that Congress considered the veto provision to be an important part of § 43. While the reasons for doing so are apparently not fully recorded, the Conference Committee report indicates that the legislative veto provision, taken from the Senate bill, was significantly

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[4] A summary of legislative veto provisions can be found in The Supreme Court Decision in *INS v. Chadha* and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 24-72 (appended to statement of Edward C. Schmults, Deputy Attorney General).

strengthened before passage by the addition of the requirement that final regulations be submitted to Congress thirty days before they are issued. House Conf.R. No. 95-1779, 95th Cong., 2d Sess. 105-06 (1978), U.S. Code Cong. & Admin.News 1978, p. 3737. This refutes the notion that the veto provision was mere boilerplate with which Congress was little concerned. The legislative history thus casts "grave doubt" that Congress would have enacted the Employee Protection Program in its present form without the accompanying legislative veto provision. *See Pierce*, 697 F.2d at 307.

"Congress did not declare the [veto] clause . . . to be severable," *Pierce*, 697 F.2d at 307 n. 5, and a court cannot simply assume that it is severable. In the words of Justice Frankfurter, construing legislation "is nothing like a mechanical endeavor . . . . [I]nevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate." *Local 1976, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 357 U.S. 93, 100, 78 S.Ct. 1011, 1016, 2 L.Ed.2d 1186 (1958). Here the statutory language directly links the admittedly unconstitutional provision with the specific grant of rulemaking authority under attack. Absent a responsible basis for concluding that Congress did not consider the veto provision a central if not essential component of that grant of authority, and would thus have enacted the remainder of § 43 in its present form without it, the veto provision cannot be severed and § 43 must be declared unconstitutional in its entirety. In the Court's judgment the other "relevant legislative materials" do not supply such a basis; if anything, they reinforce the view that the legislative veto provision was intended to be an integral part of the entire section.

Taking into account the content and structure of the Airline Deregulation Act, the circumstances surrounding its enactment, and its legislative history, the Court thus finds lacking "sufficient evidence that Congress would have enacted the [Employee Protection Plan] provision without regard to the clause [providing for a legislative veto]." *Pierce*, 697 F.2d at 307 n. 5. The Court therefore concludes that the unconstitutional legislative veto provision of § 43 is inextricably bound to the remainder of that section and that Congress would not have enacted the remainder of § 43 in its absence.[5] Accordingly, an Order declaring § 43 unconstitutional in its entirety has been filed herein.[6]

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[5] Defendants suggest that the Court cannot strike down § 43 in its entirety without also striking down the entire Airline Deregulation Act. The Court has little difficulty in rejecting this argument, and extended discussion is not necessary. The Court notes, however, that Congress clearly considered the Employee Protection Program to be an ancillary, preventative measure it did not even expect would be used; it was enacted to deal with the mere "theoretical possibility that a major reduction might occur in the labor force of one or more airlines" as a result of deregulation. S.Rep. No. 631, 95th Cong., 2d Sess. 113 (1978). Nothing in the statute or legislative history even remotely suggests that Congress would not have passed the Act without the EPP or that in the absence of an EPP it would have taken a different approach to deregulation.

[6] The parties' cross motions were argued to the Court on May 4, 1984. Based on representations made in a motion filed by plaintiffs on May 16, 1984, that the Department of Labor had announced that the disputed regulations would become effective the next day, the Court on May 17, 1984, issued its Order disposing of the case. That Order stated that this Memorandum giving the Court's reasons would be filed at a later date.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

Article I, Sec. 1

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. Art. I, § 1.

Article I, Sec. 7, cl. 2

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. . . .

Article I, Sec. 7, cl. 3

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

STATUTES

49 U.S.C. app. § 1552 (1982). Employee protection program.

(a) General rule

(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds,

upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

(b) Monthly assistance computation

(1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining

pursuant to the maximum provided in subsection (e) of this section.

(c) Assistance for relocation

If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) Duty to hire protected employees

(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978, shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this Appendix prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 1371 of this Appendix. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employee in finding other employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) Period of monthly assistance payments

(1) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 72 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months, so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

(f) Rules and regulations

(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978.

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) Airline employees protective account

All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such

sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section.

(h) Definitions

For the purposes of this section—

(1) The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this Appendix. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 1371 of this Appendix, occurring during the first 10 complete calendar years occurring after October 24, 1978, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½-percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

(i) Transfer of authority of Board

The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

(j) Termination

The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

(Pub. L. 95-504, § 43, Oct. 24, 1978, 92 Stat. 1750.)

REFERENCES IN TEXT

The Airline Deregulation Act of 1978, referred to in subsec. (h)(2), is Pub. L. 95-504, Oct. 24, 1978, 92 Stat. 1705, as amended. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 1301 of this Appendix and Tables.

CODIFICATION

Section was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by section 1551 of this Appendix, effective in part on Dec. 31, 1981, in part on Jan. 1, 1983, and in part on Jan. 1, 1985.

For transfer of certain enforcement functions of the Secretary or other official of the Department of Transportation relating to compliance with this chapter and the authorizations and regulations issued thereunder to the Federal Inspector, Office of Federal Inspector of the Alaska Natural Gas Transportation System, see Transfer of Functions note set out under section 1301 of this Appendix.

REGULATIONS

Part 220—AIRLINE EMPLOYEE PROTECTION PROGRAM

Subpart A—Purpose and Scope of the Airline Employee Protection Program

Sec.

220.01 Definitions.
220.02 Purposes.
220.03 Scope.
220.04 Responsibilities of the Secretary of Labor.

Subpart B—Designated Employees' Eligibility and Rights

220.10 Eligibility requirements.
220.11 Designated employees' rights.

Subpart C—Carriers' Responsibilities

220.20 Duty to hire.
220.21 Criteria for employment.
220.22 Listing a vacancy.
220.23 Content of vacancy listing.
220.24 Filling a vacancy.
220.25 List of protected employees.
220.26 Appeals to the Secretary.
220.27 Notice of rights.
220.28 Air Carrier actions to be reported to the Secretary.
220.29 Equal employment opportunity.

Subpart D—Designated Employees' Responsibilities

220.30 Designated employees' responsibilities.

Subpart E—Department of Labor's Responsibilities

220.40 Comprehensive job list.
220.41 List of protected employees.

Subpart F—Administration

220.50 Effective period of the program.
220.51 Disclosure of information.

Appendix I—U.S. Carriers certificated as of October 23, 1978 under Section 401 of the Federal Aviation Act of 1958, as amended.

Authority: Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1750-1753 (49 U.S.C. 1552).

(Secretary's Order No. 1-79, 44 FR 13093)

Subpart A—Purpose and Scope of the Airline Employee Protection Program

§ 220.01 Definitions.

As used in this Part, unless the content otherwise indicates:

(a) "Act" means the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705.

(b) "Air Carrier" means an air carrier certificated under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

(c) "Center" means the entity or location which from time to time may be designated by the Secretary to receive, maintain and distribute the job listing information required by this Part.

(d) "Corporate officer" means an individual who holds any officer's position established pursuant to the Articles of Incorporation or bylaws of any air carrier, or who is otherwise identified as an officer by any air carrier, in filings with the Federal Aviation Administration, Civil Aeronautics Board or Securities and Exchange Commission or in any reports to stockholders or any public communications of an air carrier.

(e) "Covered air carrier" means an air carrier which was certificated prior to October 24, 1978 (A listing of such carriers appears as an appendix to these regulations).

(f) "Designated employee" means a protected employee who meets the eligibility requirements set forth in Section 220.10.

(g) "Effective period" means the period commencing on the effective date of these regulations and ending on the later of: (1) October 23, 1988, or (2) the last day of the final month in which the Secretary is required to make a payment under Section 43 of the Act; except that nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978, and the effective date of these regulations.

(h) "Eligibility period" means the ten-year period beginning on October 24, 1978.

(i) "Employment relationship" means an attachment to a covered air carrier which includes, but is not limited to, compensated service, furlough, leave, or strike.

(j) "Equal employment opportunity requirement" means a specific equal employment requirement, pursuant to a federal court or administrative order, consent decree, or conciliation agreement, requiring that named individuals or specific members of a class are entitled to relief by virtue of the carrier's unlawful employment discrimination.

(k) "Occupational specialty" means the class, craft, or field of endeavor in which an individual was employed at the time of separation from a covered air carrier or in which the employee was employed during the 12 months immediately preceding the date of separation.

(l) "Protected employee" means a person other than a member of the Board of Directors or corporate officer of a covered air carrier:

(1) Who had an employment relationship with a covered air carrier on October 24, 1978, and

(2) Who on October 24, 1978, had four years of employment or four years accrued seniority with a single covered air carrier. The term employee shall include any full or part-time employee other than an employee in seasonal or temporary employment as defined herein. As used herein four years of employment shall mean not less than 48 months (whether or not consecutive) in which the employee actually completed the minimum number of hours of regular employment required for such employee's craft, class or position under the then applicable requirements of the employing carrier.

(m) "Seasonal employment" means employment during limited periods of the year due to peak market conditions or other factors which are periodic in nature, and in positions which do not confer seniority or recall rights.

(n) "Secretary" means the Secretary of Labor of the United States.

(o) "Temporary employment" means employment of limited duration which does not confer seniority or recall rights.

(p) "Terminated," means, unless expressly provided to the contrary, termination of employment, other than for cause.

(q) "Terminated for cause" means the separation of an individual from employment initiated by an air carrier for violation of such carrier's rules, policies, procedures, or practices pertaining to employee standards of conduct, job performance, or dependability.

(r) "Vacancy" means an employment opportunity other than seasonal or temporary employment, which an air carrier seeks to fill from outside its existing or furloughed work force.

§ 220.02 Purpose.

Section 43(d) of the Act provides a first-right-of-hire for designated employees of covered air carriers. The regulations in this Part are issued to effectuate section 43(d)(1) and (2) of the Act (hereinafter referred to as the Rehire Program).

§ 220.03 Scope.

(a) The Rehire Program is applicable only to designated employees, as more fully set forth herein, and only those employees who are expressly granted a hiring preference under the Act and these regulations have any rights under the Rehire Program. The Secretary of Labor will also publish a comprehensive list of jobs available with air carriers.

§ 220.04 Responsibilities of the Secretary of Labor.

The Secretary of Labor is responsible for administering the Rehire Program, and the Assistant Secretary for Labor-Management Relations, Labor-Management Services Administration (LMSA), has been delegated responsibility for the following:

(a) The development and promulgation of policies, regulations and procedures covering the first-right-of-hire provisions of Section 43(d)(1) of the Act;

(b) The development and promulgation of policies, regulations, and procedures covering the comprehensive job list required under Section 43(d)(2) of the Act; and

(c) The establishment and implementation of reporting requirements for air carriers to obtain pertinent information necessary for fulfilling the Secretary's responsibilities under Section 43(d)(2) of the Act.

Subpart B—Designated Employees' Eligibility and Rights

§ 220.10 Eligibility requirements.

(a) To qualify as a designated employee eligible for rights under this Part 220, an applicant must be a protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period.

(b) A protected employee shall not be deemed to be furloughed or terminated if such employee:

(1) Retired voluntarily;

(2) Was required to retire by virtue of reaching the mandatory retirement age, if any, established by a covered air carrier or as prescribed by any government agency with regulatory authority over a covered air carrier;

(3) Retired due to a disability;

(4) Is on strike or is withholding services in support of other employees who have struck the covered air carrier;

(5) Is terminated for cause as defined in § 220.01;

(6) Resigned or voluntarily quit for any reason.

(c) A designated employee who is recalled by his former carrier is no longer eligible under this section to exercise the first-right-of-hire. Such a person may become a designated employee in the future due to a subsequent termination or furlough which occurs on or prior to the expiration of the eligibility period.

§ 220.11 Designated employees' rights.

(a) A designated employee shall have a first-right-of-hire in such employee's occupational specialty, regardless of age, with any covered air carrier hiring additional

employees; *Provided, however,* That each designated employee must satisfy all qualifications or other requirements established by the hiring carrier (subject to the limitations contained in Section 220.21) and must make a timely application in accordance with normal carrier procedures for any particular job vacancy.

(b) A designated employee hired by any covered air carrier pursuant to the provisions of the Act shall not be required, as a condition of employment, or in any other manner, to relinquish, waive, or forfeit any seniority or recall rights which such person may possess with any other air carrier; *Provided, however,* That the provisions of this part shall not be deemed to create or prolong any such seniority or recall rights.

Subpart C—Carriers' Responsibilities

§ 220.20 Duty to hire.

(a) Subject to § 220.24, a covered air carrier shall have the duty to hire a designated employee, regardless of age, who otherwise meets the qualification requirements established by such carrier before it hires any other applicant when such carrier is seeking to fill a vacancy in the designated employee's occupational specialty from outside its work force. As used herein "work force" shall include all present employees and any furloughed or terminated employees who, at the time of furlough or termination, possessed recall or seniority rights.

(b) Subject to the provisions of § 220.24, a covered air carrier shall not fill a vacancy, which would otherwise be available to a designated employee, by promoting or reassigning a seasonal or temporary employee, *unless* such seasonal or temporary employee is a designated employee.

(c) When considering applications from more than one designated employee for a particular vacancy, a covered

air carrier shall be entitled to offer employment to any such designated employee in its absolute discretion.

§ 220.21 Criteria for Employment.

(a) A covered air carrier shall be entitled to apply any prerequisites or qualifications determined by it for any vacancy, except that, solely with respect to the duty to hire created by the Act, a covered air carrier shall not be entitled to limit employment opportunities for designated employees on the basis of:

(1) Initial hiring age (provided that such prohibition shall not be applicable to retirement ages applicable to all of any class or craft of such air carrier's employees); or

(2) The existence of any seniority, recall rights or previous experience with any other air carrier; *Provided, however,* That covered air carriers shall be entitled to require prospective employees to disclose the existence of any such seniority or recall rights in making application for employment and to take the existence or nonexistence of such rights into account in selecting from among those qualified designated employees who have applied for a particular job vacancy.

(b) In filling job vacancies during the effective period, covered air carriers shall be entitled to require applicants to furnish evidence that they are designated employees.

§ 220.22 Listing a vacancy.

(a) During the effective period all air carriers shall be required to list each vacancy with the Center at the earliest practicable time, and to include with such listing a statement as to whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy. In addition, any air carrier shall be entitled to list anticipated vacancies with the Center at any time.

§ 220.23 Content of vacancy listing.

Air carriers shall provide the Center with a description for each job listing, which shall include, but need not be limited to, the following—

(a) Job title;

(b) Type of position (full or part-time);

(c) Salary;

(d) Basic qualifications and/or training requirements;

(e) Brief description of duties;

(f) Location of vacancy (if known);

(g) Special requirements such as type rating, licensing, skill requirements, etc.;

(h) Whether the vacancy is subject to the duty to hire;

(i) Information on how to apply, such as contact person, mailing address, and any special application procedures; and

(j) Whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy.

§ 220.24 Filling a vacancy.

(a) A covered air carrier may fill a vacancy with a designated employee at any time after a vacancy has been listed with the Center.

(b) A covered air carrier may fill a vacancy with someone who is not a designated employee after the vacancy has been listed with the Center for at least 30 calendar days; if

(1) No designated employee with the requisite occupational specialty has applied for the vacancy in accordance with § 220.30 within that time;

(2) No designated employee who did apply within that time period meets the carriers' criteria for employment as set forth in § 220.21; or

(3) The vacancy is subject to an equal employment opportunity requirement and the carrier cannot satisfy such equal employment opportunity requirement by hiring a designated employee.

(c) A covered air carrier may fill a vacancy on a temporary basis with someone who is not a designated employee while the carrier is considering applications for the vacancy which were received from designated employees during the listing period.

(d) The date of the listing shall be the date on which the listing is received by the Center.

§ 220.25 List of protected employees.

(a) Within 60 calendar days of the effective date of these regulations, each covered air carrier shall provide the Secretary with a list of all protected employees who were employed by it on October 24, 1978.

(b) The list shall contain the following information:

(1) Protected employee's name;

(2) Social Security number (if available); and

(3) Current occupational specialty for present employees or occupational specialty at the time of separation from employment for former employees.

(c) Not later than 90 calendar days after the effective date of these regulations, each covered air carrier shall provide a onetime notice to each employee with an employment relationship with the carrier on October 24, 1978, stating whether or not the carrier has determined that employee to be a protected employee within the meaning of these regulations, and if so that the carrier has reported his or her name to the Secretary. Employ-

ees who are determined to be not protected shall be advised of their rights to appeal.

(2) Employees who dispute the carrier's determination of protected status may submit evidence of their status to the covered air carrier within 60 calendar days of receiving the notice required by paragraph (c)(1).

(3) The covered air carrier shall consider the evidence submitted by the employee and shall inform the employee of its final determination within 15 calendar days of the submission of evidence. In the event the carrier determines that the employee qualifies as a protected employee, it shall forward the information required by paragraph (b) of this section to the Secretary.

§ 220.26 Appeals to the Secretary.

(a) If the employee disagrees with the carrier's final determination under § 220.25 that he or she is not a protected employee within the meaning of this part, the employee (or his or her designated representative with express authorization) may appeal such determination to the Secretary within 60 calendar days of the carrier's final decision under § 220.25(c)(3) or the date when such decision was required.

(b) An appeal must be written, dated, and signed by the employee. It must set forth:

(1) The full name, address, and telephone number of the employee;

(2) The full name and address of the carrier making the determination; the full name of the individual(s) who made the determination for the carrier and the date of that determination;

(3) A summary of the pertinent events and circumstances concerning the employee's status and the basis of the disagreement, including the original date of hire,

date of all periods of furlough, leave or termination, and copies of relevant documents; and

(4) Such other information as may be required by the Labor-Management Services Administration (LMSA).

(c) Any appeal hereunder may be filed with any office of the LMSA (LMSA Area offices are listed as an appendix to these regulations). Upon receipt, an appeal will be forwarded to an LMSA Regional Office where the Regional Administrator will make a preliminary review of the appeal, and if warranted, request information from the parties or conduct such other investigation as may be required. If the matter cannot be resolved informally, the Regional Administrator will forward the file to the Secretary for review.

(d) If upon review of an appeal hereunder the Secretary determines that further action is not appropriate, he will so advise the parties. If upon review of the entire record the Secretary determines that the employee qualifies for protected status, the Secretary will take appropriate steps to add the employee's name to the list of protected employees and will so notify the parties.

§ 220.27 Notice of Rights.

(a) Not later than the date of separation from employment, a covered air carrier which furloughs or terminates a protected employee during the eligibility period, unless such furlough is limited to a specific period of less than 90 calendar days, shall furnish such protected employee with a notice of rights in the form of a letter or other written documentation that such employee is a designated employee and thereby is entitled to exercise a first-right-of-hire. Such notice of rights shall include, but not be limited to the following information:

(1) Name;

(2) Social Security number (if available);

(3) Occupational specialty;

(4) Date of furlough or termination;

(5) An official of the covered air carrier who can verify the individual's status as a designated employee; and

(6) Signature, name, and location of the certifying official.

(b) As soon as practicable, but not later than 60 calendar days following the effective date of these regulations, each covered air carrier shall make a reasonable effort to provide the notice of rights required in paragraph (a) of this section to any designated employee who was furloughed or terminated by such carrier on or after October 24, 1978, and prior to the effective date of these regulations and who has not been recalled to employment by such covered air carrier.

(c) A covered air carrier shall provide a verified true copy of the notice of rights to a designated employee who has lost his or her original copy.

§ 220.28 Air carrier actions to be reported to the Secretary.

(a) A covered air carrier shall report to the Secretary:

(1) The names and Social Security numbers (if available) of all designated employees hired by it, and

(2) The filling of any vacancy with other than a designated employee. With respect to any occurrences reported under paragraph (a)(2) of this section, the report of the covered air carrier shall contain the job order number assigned to that vacancy by the Center, the date of hire, and a certification by a corporate officer that the carrier complied with the provisions of this part and that no qualified designated employee with the requisite occupational specialty applied in a timely manner.

(b) Two copies of the reports required by this section shall be filed with the Secretary covering the six-month periods ending June 30 and December 31 of each calendar year in which these regulations are in effect and shall be submitted within 60 calendar days of the end of the reporting period.

§ 220.29 Equal Employment Opportunity.

(a) Where a covered air carrier is under an equal employment opportunity requirement, the covered air carrier shall, to the extent possible, satisfy this equal employment obligation by hiring qualified designated employees.

(b) Where a covered air carrier is under an equal employment opportunity requirement and cannot satisfy such requirement by hiring from the pool of qualified designated employees, the carrier may meet its equal employment requirement by hiring non-designated employees. *Provided, however,* That this provision shall not change or reduce the responsibilities of carriers in regard to the hiring procedures required by §§ 220.21, 220.22, 220.23, and 220.24.

Subpart D—Designated Employees' Responsibilities

§ 220.30 Designated employees' responsibilities.

It is the responsibility of each designated employee to:

(a) Make application to any covered air carrier for whom the designated employee desires to work in the time and manner required by such carrier.

(b) To insure that an application previously submitted to a covered air carrier which currently lists a vacancy is in an active status so as to be considered for such vacancy;

(c) To provide a copy, if requested, of the notice of rights to a potential employing air carrier, and

(d) To retain the original notice of rights for future use.

Subpart E—Department of Labor's Responsibilities

§ 220.40 Comprehensive job list.

(a) The Secretary shall establish a Center to maintain a comprehensive listing of all vacancies listed by air carriers in accordance with §§ 220.22 and 220.23.

(b) The Center will be accessible by telephone throughout the United States to facilitate the listing or modifying of vacancy information by air carriers.

(c) The Center shall provide an air carrier with an identifying number for each vacancy listed on the comprehensive listing.

(d) The comprehensive listing shall be compiled, published and distributed to each local office of the State Employment Security Agencies on a periodic basis as determined necessary by the Secretary, and it shall be distributed to such other individuals or organizations as may desire to receive copies thereof in accordance with criteria established by the Secretary from time to time.

§ 220.41 List of protected employees.

The Secretary shall establish and publish a list of protected employees as reported by covered air carriers under § 220.25. A copy of this list shall be sent to all covered air carriers as soon as available.

Subpart F—Administration

§ 220.50 Effective period of the program.

(a) *Beginning date.* (1) The requirements set forth in this part shall be effective 60 legislative days from publication of these regulations (A legislative day is defined by the Act as a calendar day when both Houses of Congress are in session).

(2) The Department shall publish a notice in the Federal Register announcing the actual effective date.

(b) *Ending date.* This program and these regulations terminate on the last day of the effective period.

(c) Nothing in this Part shall affect the rights and duties of protected employees and covered air carriers under the Act prior to the effective date of this Part.

§ 220.51 Disclosure of information.

The Department of Labor shall make available to covered air carriers and to designated employees or their authorized representatives, all reports, certifications, or lists collected under this Part, to the extent permitted by the Privacy Act (5 U.S.C. 552a) and the Department's regulations issued pursuant to that Act (29 CFR Part 70a).

Appendix I—U.S. Carriers Certificated as of October 23, 1978, Under Section 401 of the Federal Aviation Act of 1958, as Amended

(Annotations Reflect Operating Status as of October 25, 1983).

1. Airlift International, Inc.
2. Air Micronesia, Inc.
3. Air Midwest
4. Air New England, Inc. (*1*)
5. Air Wisconsin, Inc.
6. Alaska Airlines, Inc.
7. Allegheny Airlines, Inc. (*2*)
8. Aloha Airlines, Inc.
9. American Airlines, Inc.

10. Aspen Airways, Inc.
11. Braniff Airways, Inc. (*1*)
12. Capitol International Airways, Inc. (*3*)
13. Chicago Helicopter Airways, Inc.*
14. Colonial Airlines, Inc. (*1*)
15. Continental Air Lines, Inc.
16. Delta Air Lines, Inc.
17. Eastern Airlines, Inc.
18. Evergreen International Airlines, Inc.
19. The Flying Tiger Line, Inc.
20. Frontier Airlines, Inc.
21. Hawaiian Airlines, Inc.
22. Hughes Air Corp.* (*4*)
23. Kodiak Western Alaska Airlines, Inc.
24. Mackey International Airlines, Inc.*
25. McCulloch International Airlines, Inc.
26. Midway Airlines, Inc.
27. Midway (Southwest) Airways Co.
28. Modern Airways, Inc. (*1*)
29. Munz Northern Airlines, Inc.
30. National Airlines, Inc.* (*5*)
31. New York Airways, Inc.*
32. North Central Airlines, Inc.* (*4*)
33. Northwest Airlines, Inc.
34. Overseas National Airways, Inc. (*6*)
35. Ozark Air Lines, Inc.

36. Pan American World Airways, Inc.
37. Piedmont Aviation, Inc.
38. Reeve Aleutian Airways, Inc.
39. Rich International Airlines, Inc.
40. Seaboard World Airways, Inc.* (7)
41. Southern Air Transport, Inc.
42. Southern Airways, Inc.* (4)
43. Texas International Airlines, Inc.
44. Trans International Airlines, Inc. (8)
45. Trans World Airlines, Inc.
46. United Airlines, Inc.
47. Western Air Lines, Inc.
48. Wien Air Alaska, Inc.
49. World Airways, Inc.
50. Wright Air Lines, Inc.
51. Zantop International Airlines, Inc.

* No longer holds certificate.

(1) Holds certificate, but not operating.

(2) Renamed U.S. Air, Inc.

(3) Renamed Capitol Air, Inc.

(4) Merged in to Republic Airlines, Inc.

(5) Merged into Pan American World Airways, Inc.

(6) Ceased operations in September 1978.

(7) Merged into Flying Tiger Line, Inc.

(8) Renamed Transamerica Airlines, Inc.

Note.—This appendix will appear in the Code of Federal Regulations.

APPENDIX D

The following is a list of parent companies, subsidiaries (except wholly owned) and affiliates of petitioners, pursuant to Supreme Court Rule 28.1:

Alaska Air Group, Inc.

AMR Corporation

Capitol Air Sales, Inc.

Air Reservations, Inc.

Tiger International, Inc.

Skyvoyager Air, Inc.

Tiger Trading Co.

Flying Tiger Air Services, Inc.

SWAP, Inc.

Montana Enterprises, Inc.

Tomisato Shoji Kabuskiki Kaisha

Affiliated Enterprises, Inc.

Norfolk Southern Corporation

Air Services, Inc.

Aviation Supply Corporation

NWA, Inc.

Northwest Aircraft, Inc.

Gatwick Handling, Ltd.

Compas 315, Ltd.

Ozark Holdings, Inc.

UAL, Inc.

Hertz Corp.

Mauna Kea Properties, Inc.

Westin Hotel Company

GAB Business Services, Inc.

UAL Capital Corporation

146 Haynes Corporation

Olohana Corporation

Mileage Plus, Inc.

E & T Trading Corporation

United Airlines Capital Corporation

United Airlines Credit Corporation

United Airlines Aircrew Training, Inc.

United Airlines B.V.

United Airlines S.A. de C.V.

United Vacations, Inc.

UAL Leasing, Inc.

Contingency Corp.

Dempster Properties

J & N Trading Corporation

The Linneman Corporation

United Airlines Space Technologies

USAir Group, Inc.

Henson Aviation, Inc.

JJF Investments, Inc.

WAL Communication, Inc.

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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,

Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*

Repondents,

and

AIR LINE PILOTS ASSOCIATION, INT'L,

Intervenor.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR INTERVENOR AIR LINE PILOTS ASSOCIATION IN OPPOSITION

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Where Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f), 92 Stat. 1705, 1750 (1978), contains an admittedly unconstitutional legislative veto proviso, did the Court of Appeals correctly conclude that the veto proviso was severable from the remainder of § 43 because Congress would have preferred continuation of the labor protective provisions of § 43 without the veto rather than nullification of the entire Section?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Court of Appeals Court Correctly Sought to Ascertain The Dominant Intent of Congress In Determining Whether The Invalid Veto Proviso Should Be Severed From The Remainder Of Section 43	5
II. The Court of Appeals Correctly Concluded That Congress Would Have Preferred The Employee Protection Plan of § 43 With The Veto Proviso Severed Out To An Airline Deregulatory Statute Stripped Of Any Employee Protection Plan	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Buckley v. Valeo, 424 U.S. 1 (1976) 5

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210 (1932) 5

EEOC v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984) 7

Gulf Oil Corp. v. *Dyke*, 734 F.2d 797 (TECA 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 173 (1984) 6

Immigration & Naturalization Service v. *Chadha*, 462 U.S. 919 (1983) ..... *passim*

McCorkle v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 8

Regan v. *Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 82 L.Ed. 2d 487 (1984) 3, 5-6

MISCELLANEOUS

S. Rep. No. 631 95th Cong., 2d Sess. (1978) 2

H. Rep. No. 95-1211, 95th Cong., 2d Sess. (1978) 2

48 Fed. Reg. 52,854 (1983) 3

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 1

Section 43, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, codified at 49 U.S.C. Sec. 1552 ..... *passim*

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ALASKA AIRLINES, INC., *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE AIR LINE PILOTS ASSOCIATION IN OPPOSITION

COUNTER STATEMENT OF THE CASE

The Airline Deregulation Act of 1978 ("ADA"), Pub. L. 95-504, 92 Stat. 1705 (October 24, 1978) reduced government economic regulation of the airline indus-

try in order to promote greater competition among carriers. The ADA was intended to substantially increase the ability of new carriers to enter the industry, of existing carriers to expand into new markets, and of all carriers to set fares and schedules based on market conditions. *E.g.*, S. Rep. No. 631, 95th Cong., 2d Sess. pp. 1-5 (1978); H. Rep. No. 95-1211, 95th Cong., 2d Sess. pp. 1-5 (1978). The impact of airline deregulation on airline employees was the subject of discussion in Congress. On the one hand, it was thought that increased competition would ultimately result in an increase in airline employment. On the other hand, it was recognized that deregulation could have adverse consequences for at least some airline employees because, with increased competition, carriers could lose as well as gain business. Appendix to Petition for Certiorari ("Pet. App. ___"), pp. 20a, 22a, n. 11 at 22a. Congress resolved the matter by including in the ADA as Section 43 (92 Stat. 1705, 1750, codified at 49 U.S.C. App. § 1552 (1982)) labor protective provisions which (1) authorized, subject to later appropriations, financial assistance to employees displaced as a result of deregulation, and (2) granted a hiring preference, referred to as "first right to hire", to furloughed or terminated employees meeting certain statutory criteria.

The Secretary of Labor was directed to issue rules and regulations necessary to administer the employee protection provisions of § 43. However, the Secretary's authority in this regard was limited by a proviso in § 43(f) which not only required him to give advance notice of any rule or regulation he intended to issue to designated House and Senate committees, but also allowed either House of Congress to veto

any such rules and regulations by majority resolution. It is undisputed that the legislative veto incorporated in § 43 is unconstitutional in light of this Court's decision in *Immigration & Naturilization Service* v. *Chadha*, 462 U.S. 919 (1983).

To date, the financial assistance portion of § 43 has not been funded and the Secretary of Labor has issued no regulations implementing that program. Pet. App. 3a. With regard to "first right of hire", final regulations were published by the Secretary on November 22, 1983 (48 Fed. Reg. 52,854 (1983)), were duly transmitted to Congress, and were to become effective after sixty legislative days. Pet. App. 5a. Before the regulations became effective, however, Petitioners herein filed a complaint against the Secretary of Labor in United States District Court for the District of Columbia asserting, *inter alia*, that § 43 and the regulations issued thereunder were invalid because of the unconstitutional legislative veto in § 43(f) which, it was argued, could not appropriately be severed from the remainder of the Section. The District Court agreed, issuing an order and opinion to that effect on May 17, 1984 and May 18, 1984, respectively. Pet. App. 5a-6a, 30a-37a.[1]

On July 16, 1985, the Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-29a. The Court, citing this Court's decisions in *Chada, supra*, 462 U.S. at 931-32 and *Regan* v. *Time, Inc.*,

[1]The Air Line Pilots Association, International ("ALPA") and several other unions intervened in the district court action against the Secretary of Labor. ALPA is a labor organization which represents approximately 34,000 commercial airline pilots for collective bargaining purposes. Impiementation of § 43 is of vital interest to a significant of ALPA's members.

___ U.S. ___, 104 S.Ct. 3262, 3269 (1984), held that it was far from " '*evident*' that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality." Pet. App. 19a. On the contrary, "what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection; in contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision." *Ibid.* In the Court's view, "the evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan." *Ibid.* Indeed, "there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." Pet. App. 28a.

SUMMARY OF ARGUMENT

The applicable standard for determining whether the invalid legislative veto proviso contained in § 43 can be severed from the remainder of § 43 is that set forth in this Court's decision in *Chadha, supra*: whether it is evident that Congress would have enacted § 43 but for the inclusion of the veto proviso. The Court of Appeals followed that standard in the instant case by concluding that, as between preserving § 43 and tearing down the section in its entirety, the latter would be far more destructive of the Legislature's will than the former.

The Court's conclusion is amply supported by legislative history, which clearly demonstrates that Congress placed considerable emphasis on according

airline employees protection from the impact of deregulation, but did not deem the veto proviso to be an essential part of § 43. Circumstantial evidence to the contary relied on by Petitioners was properly weighed by the Court of Appeals but was not found persuasive.

ARGUMENT

I. The Court of Appeals Correctly Sought to Ascertain The Dominant Intent of Congress In Determining Whether The Invalid Veto Proviso Should Be Severed From The Remainder Of Section 43

In deciding the severability issue in this case, the Court of Appeals adhered to the standard mandated by this Court. Thus, the Court of Appeals began its own analysis by focusing on this Court's "instructive" statement in *Chadha, supra,* that "the invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Pet. App. 16a, quoting from *Chadha,* 462 U.S. at 931-32, which, in turn, quotes from *Buckley* v. *Valeo,* 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. 210, 234 (1932). The Court of Appeals likewise recognized that *Chadha* places the "burden . . . squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision [in question] without the severed portion." Pet. App. 17a. The Court of Appeals further recognized that "[t]his presumption [of severability] articulated by *Chadha* was echoed in a later Supreme Court severability case: 'Whether an unconstitutional provision is severable from the remainder of the stat-

ute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Pet. App. 17a-18a, quoting *Regan* v. *Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984).

Petitioners do not appear to quarrel with the foregoing. They argue, however, that the Court of Appeals should have considered whether Congress would not have passed some alternate version of § 43 if it knew that it could not lawfully include the veto proviso. *E.g.* Pet. 9. And they fault the Court of Appeals for responding to this argument in the same manner as the Temporary Emergency Court of Appeals responded to a similar argument in *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984): "the question is not whether Congress would have enacted th[is] *exact* statute[ ] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[ ], after severance of the legislative veto provision[ ], to no statute[ ] at all." Pet. App. 18a.

Petitioners' contentions, we submit, do not raise any issue which warrants consideration by this Court in light of the "[a]mple evidence" that the employee protection program was deemed by Congress to be an important part of the ADA and the contrasting lack of evidence that the veto proviso was regarded as critical. Pet. App. 28a. Thus, the result reached by the Court of Appeals is virtually mandated by the presumption of severability set forth in *Chadha* and reaffirmed in *Regan*. But even if that were not so, the Court of Appeals did not err by considering the severability question based on the likely legislative

intent with respect to the current alternatives. The Court had to choose between severability and inseverability. If inseverability was the choice, it is undeniable that there would literally be "no airline employee protection provision at all" (Pet. App. 19a) in the ADA. To be sure, as the Court of Appeals was undoubtedly aware, Congress could, if it desired to do so, pass new legislation to remedy the deficiency. However, the Court had no reason to believe that this is what Congress would have wanted. Indeed, given the delay involved and the probability that Congress would be preoccupied with other pressing legislative business, the Court had every reason to believe otherwise. Accordingly, the Court's assessment of the situation—as succinctly put in the concurring opinion of Judge Ginsburg—is entirely accurate: "only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions." Pet. App. 29a. As between "excision" and "demolition", the Court quite properly concluded that the choice most consistent with the dominant intent of Congress when it enacted § 43 was preservation of that section without the veto rather than destroying the section in its entirety.

Contrary to Petitioners (Pet. 16-20), this case does not create a conflict in the circuits over the appropriate severability analysis. As Petitioners acknowledge, the underlying issue in the cases they cite is whether Congress would have delegated such broad authority without a veto provision. Pet. 19. *E.g. EEOC* v. *CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) ("whether Congress would have delegated to the President the broad reorganizing authority granted

him by the Act without reserving for itself the one-house veto power . . ."); *McCorkle* v. *United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (whether Congress would have granted the President the power to set congressional, executive, and judicial salaries without a veto restriction). So here, as the Court of Appeals framed the issue—*i.e.*, whether "it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality" (Pet. App. 19a)—the question likewise is whether Congress would have granted the rule-making authority it did in § 43 without a veto provision. As we now show, the appellate court's review of the legislative history left little doubt that enactment of § 43 did not hinge on inclusion of the veto proviso, and does not justify further review by this Court.

II. The Court of Appeals Correctly Concluded That Congress Would Have Preferred The Employee Protection Plan of § 43 With The Veto Proviso Severed Out To An Airline Deregulatory Statute Stripped Of Any Employee Protection Plan

The "numerous comments" in the committee reports and in floor debate cited by the Court of Appeals (Pet. App. 20a-23a) fully support the Court's conclusion that Congress attached considerable importance to the employee protection plan embodied in § 43. By contrast, the Court found that "the only discussion . . . with respect to the veto provision is a solitary comment by then-Representative Elliot Levitas of Georgia expressing approval of the presence of a legislative veto in the provision." Pet. App. 23a. As the Court observed, "this sole source [is] a thin reed for

eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees." *Ibid.*

Nor do the "various items of circumstantial evidence" (Pet. App. 24a) which Petitioners relied on below, as they do here (Pet. 20-22), provide any stronger reed to support their position. Thus, Petitioners contend that a veto proviso was inserted in § 43 because Congress adopted a novel Senate employee protection plan instead of the more traditional House approach. Pet. 21-22. However, as the Court of Appeals pointed out (Pet. App. 27a-28a), the Senate plan offered less protection to employees than did the House approach; hence, it "seems . . . unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy." Pet. App. 28a. Moreover, there is "no evidence" that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." *Ibid.*

Petitioners fare no better with their contention that the importance of the legislative veto proviso in § 43 is demonstated by the fact that a veto proviso appears nowhere else in the ADA. Pet. 21. As the Court of Appeals stated, the ADA is essentially a deregulatory statute in which § 43 stands out as the exceptional regulatory provision; ". . . as a matter of common sense, [it is] the regulatory provision which would be the most likely candidate for inclusion of a legislative veto device." Pet. App. 25a.

Finally, Petitioners urge that the Court of Appeals ignored the significance of the unique combination in § 43 of a "report and wait" proviso and a legislative veto proviso. Pet. 20. The combination may be unique,

but its significance is elusive. The Court of Appeals quite properly regarded it as indicative of understandable Congressional interest, but falling far short of establishing that degree of interest which would make it "evident" that Congress would not have enacted § 43 in the absence of the veto proviso. Pet. App. 25a.

CONCLUSION

For the reasons stated above, the Intervenor Air Line Pilots Association respectfully requests that the petition for *certiorari* be denied.

Respectfully submitted,

GARY GREEN
EUGUNE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
Counsel for Air Line Pilots Ass'n
**Counsel of Record*

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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

MATTHEW H. FINUCANE
Counsel of Record
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 328-5400

CASILLAS PRESS INC - 1717 K STREET NW WASH DC - 223-1220

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QUESTION PRESENTED

Did the D.C. Circuit correctly apply this Court's decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), when it severed an unconstitutional one-house veto from a statute after finding that "there is not a shred of evidence that the veto provision was deemed to be a vital feature" of that statute? Appendix to Petition ("Pet. App.") at 28a.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The D.C. Circuit Properly Applied This Court's Holding In *Chadha* 2

II. The Decision Of The D.C. Circuit Does Not Conflict With The Decisions Of Other Circuit Courts 4

III. The D.C. Circuit Did Not Exclude From Consideration Evidence That Congress Might Have Passed A Different Bill Absent A Veto Provision 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases: Page

Alaska Airlines, Inc. v. Donovan,
766 F.2d 1550 (D.C. Cir. 1985) ..... *passim*

Alaska Airlines, Inc. v. Donovan,
594 F. Supp. 92 (D.D.C. 1984), *rev'd,*
766 F.2d 1550 (D.C. Cir. 1985) 5

Buckley v. Valeo,
424 U.S. 1 (1976) (per curiam) 3

Champlin Refining Co. v. Corporation Commission,
286 U.S. 210 (1932) 3, 4

EEOC v. CBS, Inc.,
743 F.2d 969 (2d Cir. 1984) 4

Immigration and Naturalization Service v. Chadha,
462 U.S. 919 (1983) ..... *passim*

McCorkle v. United States,
559 F.2d 1258 (4th Cir. 1977), *cert. denied,*
434 U.S. 1011 (1978) 4

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---

BRIEF OF THE ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

Respondent Association of Flight Attendants files this opposition to the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The challenged decision to sever a one-house veto flowed correctly, inevitably and explicitly from this Court's severability analysis in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), since the Court of Appeals found that "there is not a shred of evidence that the veto provision was deemed to be a vital feature" of the statute in question. Pet. App. at 28a. Where, as here, a

legislative veto is of trivial interest to Congress, severability is the only conclusion that can be reached under *Chadha*.

In asking whether Congress would have preferred no bill to the bill without the veto, a question which Petitioners contend is invalid, the D.C. Circuit simply asked the practical question that was explicitly asked in *Chadha*, namely, would Congress have preferred a return to private immigration bills, the consequence of voiding the entire statute, or the bill without the veto? *Chadha, supra,* 462 U.S. at 934.

Rather than reformulating *Chadha* and excluding evidence that Congress might have preferred a different bill, as Petitioners allege, the D.C. Circuit simply found no such evidence of Congressional intent. Petitioners' quarrel rests with the Court of Appeals' interpretation of the legislative history, and this case therfore raises no important issues about the meaning of *Chadha*.

ARGUMENT

I. The D.C. Circuit Properly Applied This Court's Holding in CHADHA.

The petition for a writ of certiorari should be denied since the decision of the Court of Appeals involves little more than the mechanical application of the severability analysis in *Chadha* to the legislative history of a law containing a legislative veto. Although Petitioners argue that the D.C. Circuit radically departed from *Chadha,* the Court of Appeals explicitly applied *Chadha's* severability analysis. Pet. App. at 15a, 16a, 17a. That analysis requires that "the invalid portions of a statute are to be severed " '(u)nless it is evident that the legislature would not have

enacted those provisions which are within its power independently of that which is not.' " *Chadha, supra,* 462 U.S. at 931-32, quoting *Buckley v. Valeo,* 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210, 234 (1932).

After a careful examination of the legislative history, an examination which considered but rejected Petitioners' arguments concerning the intent of Congress, the Court of Appeals concluded that the veto could be severed because "there is not a shred of evidence that the veto provision was deemed to be a vital feature" of the challenged statute. Pet. App. at 28a. Such a finding of severability flows inevitably in any case where a court finds a one-house veto to be of trivial interest to Congress, and the D.C. Circuit's decision is therefore unremarkable.

Petitioners contend that the Court of Appeals departed from *Chadha* by requiring those wishing to show inseverability to prove that "it is evident that Congress would have preferred no . . . provision at all to the existing provision *sans* the veto provision." Pet. App. at 19a. Yet this standard merely rephrases *Chadha* and states that, realistically, a court has two choices when confronted with a statute. It can strike down a law altogether, or uphold it without the veto. Which of these choices, based on the legislative history, would Congress have preferred?

The question of whether Congress would have preferred no bill at all, the question which Petitioners claim is inappropriate, appears at the very heart of this Court's analysis in *Chadha.* For in finding severability, this Court placed great emphasis on the fact that "there is insufficient evidence that Congress would have continued to subject itself to the onerous burden of private bills had it known that §244(c)(2) would be held unconstitutional." *Chadha,*

supra, 462 U.S. at 934. In other words, there was insufficient evidence in *Chadha* that Congress would have preferred no bill at all, which would have meant a return to private bills to prevent deportation. This is the precise conceptual question formulated by the D.C. Circuit.

II. The Decision Of The D.C. Circuit Does Not Conflict With The Decision Of Other Circuit Courts.

Petitioners' argument that the D.C. Circuit is in conflict with Supreme Court precedent and the decisions of other circuits is simply wrong. For example, Petitioners state that the truly "relevant issue of legislative intent is whether 'the legislature would have been satisifed with what remained.' " Petition at 13, quoting *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210 (1932). Yet the D.C. Circuit has done nothing more than ask whether Congress would have been satisfied with what remained or whether it would have preferred to have the bill invalidated by the courts. Congress would have been satisfied in this case, of course, because it "expressed relatively little concern about the veto provision." Pet. App. at 19a.

Similarly, the Petitioners argue that the D.C. Circuit's holding is inconsistent with the holdings of inseverability in, for example, *EEOC v. CBS, Inc.,* 743 F.2d 969 (2d Cir. 1984) and *McCorkle v. United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). But since it is abundantly clear on the facts of those cases, as interpreted, that Congress would *not* have preferred to give the President unfettered power to reorganize the executive branch or set salaries, it is clear that the D.C. Circuit would have reached the same result of inseverability for the same reasons. As the concurring opinion in the D.C.

Circuit states, the issue is always one of "(giving) effect to the dominant intent of Congress." Pet. App. at 29a.[1]

III. The D.C. Circuit Did Not Exclude From Consideration Evidence That Congress Might Have Passed A Different Bill Absent A Veto Provision.

Petitioners suggest that the real damage resulting from the "new" standard adopted by the D.C. Circuit is that it led the Court of Appeals to reject "as irrelevant evidence that Congress would have preferred a different form of employee protection if it had known that certain provisions in the program it enacted were invalid." Petition at 2. An examination of the opinion, however, reveals that the Court of Appeals carefully considered all the Petitioners' arguments that a different bill might have been approved without the veto, and simply found these arguments unpersuasive. While Petitioners believe that the conference report provided crucial evidence that Congress would have preferred a different bill, the Court of Appeals looked at the same evidence and concluded that there is "no evidence that the House's agreement to the Senate version of the

---

[1]Petitioners' survey of Supreme Court cases and the decisions in the circuit courts provides little support for the District Court's holding that severability requires proof that Congress would not have changed a word in a bill if it had written it without the veto. Pet. App. at 33a n.3. The problem with the District Court's decision is not so much its invitation to a scholastic debate on the difference between Congressional desire for *the* bill versus *the identical bill* versus *some* bill, but the fact that the District Court has subtly shifted the standard of proof. Under *Chadha,* those challenging a statute must prove that it is evident that Congress would not have passed the bill *sans* veto. Under the District Court's view the burden is on those trying to save the bill to show that Congress would have passed the identical bill without the veto.

protection plan was given in exchange for beefing up the veto device," and added that "(n)or have we found any indication that the Senate's agreement to the minor modifications in its version of the plan was premised on a 'strengthening' of the veto provision." Pet. App. at 27a, 28a. As can be seen, the D.C. Circuit did not state that evidence of a desire for a different bill is irrelevant. It simply said that there was no such evidence in the legislative history. Petitioners' argument, ultimately, is not with the standard of severability but with the D.C. Circuit's interpretation of the legislative history. That interpretation is not appropriate for this Court's review under Supreme Court Rule 17.[2]

[2]In a footnote, Petitioners argue that this case should have been brought directly to the Supreme Court from the District Court, a contention thoroughly addressed by the Court of Appeals. Pet. App. at 6a-9a. It is interesting to note that when one intervenor, Brotherhood of Railway and Airline Clerks, *et al.*, ("BRAC"), applied for a stay of the District Court decision in the Supreme Court, the Petitioners argued against it stating that: "Despite BRAC's attempt to cast Judge Gesell's ruling as a decision on constitutional issues . . . the decision in fact did nothing more than apply well-established principles of statutory construction to a particular provision of the Airline Deregulation Act. . . ." Appellee's Opposition to Appellants Application for Stay of Order and Final Judgment at 2, 3 (May 22, 1984) in *Brac v. Alaska Airline, Inc.* (No. A-947).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MATTHEW H. FINUCANE
Counsel of Record
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 328-5400

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Intervenor.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR INTERVENOR AIR LINE PILOTS ASSOCIATION IN OPPOSITION

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Where Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f), 92 Stat. 1705, 1750 (1978), contains an admittedly unconstitutional legislative veto proviso, did the Court of Appeals correctly conclude that the veto proviso was severable from the remainder of § 43 because Congress would have preferred continuation of the labor protective provisions of § 43 without the veto rather than nullification of the entire Section?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Court of Appeals Correctly Sought to Ascertain The Dominant Intent of Congress In Determining Whether The Invalid Veto Proviso Should Be Severed From The Remainder Of Section 43	5
II. The Court of Appeals Correctly Concluded That Congress Would Have Preferred The Employee Protection Plan of § 43 With The Veto Proviso Severed Out To An Airline Deregulatory Statute Stripped Of Any Employee Protection Plan	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210 (1932) 5

EEOC v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984) . . 7

Gulf Oil Corp. v. *Dyke*, 734 F.2d 797 (TECA 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 173 (1984) 6

Immigration & Naturalization Service v. *Chadha*, 462 U.S. 919 (1983) ..... *passim*

McCorkle v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 8

Regan v. *Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 82 L.Ed. 2d 487 (1984) 3, 5-6

MISCELLANEOUS

S. Rep. No. 631 95th Cong., 2d Sess. (1978) 2

H. Rep. No. 95-1211, 95th Cong., 2d Sess. (1978) 2

48 Fed. Reg. 52,854 (1983) 3

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 1

Section 43, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, codified at 49 U.S.C. Sec. 1552 ..... *passim*

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE AIR LINE PILOTS ASSOCIATION IN OPPOSITION

COUNTER STATEMENT OF THE CASE

The Airline Deregulation Act of 1978 ("ADA"), Pub. L. 95-504, 92 Stat. 1705 (October 24, 1978) reduced government economic regulation of the airline indus-

try in order to promote greater competition among carriers. The ADA was intended to substantially increase the ability of new carriers to enter the industry, of existing carriers to expand into new markets, and of all carriers to set fares and schedules based on market conditions. *E.g.*, S. Rep. No. 631, 95th Cong., 2d Sess. pp. 1-5 (1978); H. Rep. No. 95-1211, 95th Cong., 2d Sess. pp. 1-5 (1978). The impact of airline deregulation on airline employees was the subject of discussion in Congress. On the one hand, it was thought that increased competition would ultimately result in an increase in airline employment. On the other hand, it was recognized that deregulation could have adverse consequences for at least some airline employees because, with increased competition, carriers could lose as well as gain business. Appendix to Petition for Certiorari ("Pet. App. ___"), pp. 20a, 22a, n. 11 at 22a. Congress resolved the matter by including in the ADA as Section 43 (92 Stat. 1705, 1750, codified at 49 U.S.C. App. § 1552 (1982)) labor protective provisions which (1) authorized, subject to later appropriations, financial assistance to employees displaced as a result of deregulation, and (2) granted a hiring preference, referred to as "first right of hire", to furloughed or terminated employees meeting certain statutory criteria.

The Secretary of Labor was directed to issue rules and regulations necessary to administer the employee protection provisions of § 43. However, the Secretary's authority in this regard was limited by a proviso in § 43(f) which not only required him to give advance notice of any rule or regulation he intended to issue to designated House and Senate committees, but also allowed either House of Congress to veto

any such rules and regulations by majority resolution. It is undisputed that the legislative veto incorporated in § 43 is unconstitutional in light of this Court's decision in *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983).

To date, the financial assistance portion of § 43 has not been funded and the Secretary of Labor has issued no regulations implementing that program. Pet. App. 3a. With regard to "first right of hire", final regulations were published by the Secretary on November 22, 1983 (48 Fed. Reg. 52,854 (1983)), were duly transmitted to Congress, and were to become effective after sixty legislative days. Pet. App. 5a. Before the regulations became effective, however, Petitioners herein filed a complaint against the Secretary of Labor in United States District Court for the District of Columbia asserting, *inter alia*, that § 43 and the regulations issued thereunder were invalid because of the unconstitutional legislative veto in § 43(f) which, it was argued, could not appropriately be severed from the remainder of the Section. The District Court agreed, issuing an order and opinion to that effect on May 17, 1984 and May 18, 1984, respectively. Pet. App. 5a-6a, 30a-37a.[1]

On July 16, 1985, the Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-29a. The Court, citing this Court's decisions in *Chadha, supra*, 462 U.S. at 931-32 and *Regan* v. *Time*,

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[1]The Air Line Pilots Association, International ("ALPA") and several other unions intervened in the district court action against the Secretary of Labor. ALPA is a labor organization which represents approximately 34,000 commercial airline pilots for collective bargaining purposes. Implementation of § 43 is of vital interest to a significant number of ALPA's members.

Inc., ___ U.S. ___, 104 S.Ct. 3262, 3269 (1984), held that it was far from " '*evident*' that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality." Pet. App. 19a. On the contrary, "what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection; in contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision." *Ibid.* In the Court's view, "the evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan." *Ibid.* Indeed, "there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." Pet. App. 28a.

SUMMARY OF ARGUMENT

The applicable standard for determining whether the invalid legislative veto proviso contained in § 43 can be severed from the remainder of § 43 is that set forth in this Court's decision in *Chadha, supra*: whether it is evident that Congress would not have enacted § 43 but for the inclusion of the veto proviso. The Court of Appeals followed that standard in the instant case by concluding that, as between preserving § 43 and tearing down the section in its entirety, the latter would be far more destructive of the Legislature's will than the former.

The Court's conclusion is amply supported by legislative history, which clearly demonstrates that Congress placed considerable emphasis on according

airline employees protection from the impact of deregulation, but did not deem the veto proviso to be an essential part of § 43. Circumstantial evidence to the contrary relied on by Petitioners was properly weighed by the Court of Appeals but was not found persuasive.

ARGUMENT

I. The Court of Appeals Correctly Sought to Ascertain The Dominant Intent of Congress In Determining Whether The Invalid Veto Proviso Should Be Severed From The Remainder Of Section 43

In deciding the severability issue in this case, the Court of Appeals adhered to the standard mandated by this Court. Thus, the Court of Appeals began its own analysis by focusing on this Court's "instructive" statement in *Chadha, supra,* that "the invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Pet. App. 16a, quoting from *Chadha,* 462 U.S. at 931-32, which, in turn, quotes from *Buckley* v. *Valeo,* 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. 210, 234 (1932). The Court of Appeals likewise recognized that *Chadha* places the "burden . . . squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision [in question] without the severed portion." Pet. App. 17a. The Court of Appeals further recognized that "[t]his presumption [of severability] articulated by *Chadha* was echoed in a later Supreme Court severability case: 'Whether an unconstitutional provision is severable from the remainder of the stat-

ute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Pet. App. 17a-18a, quoting *Regan* v. *Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984).

Petitioners do not appear to quarrel with the foregoing. They argue, however, that the Court of Appeals should have considered whether Congress would not have passed some alternate version of § 43 if it knew that it could not lawfully include the veto proviso. *E.g.* Pet. 9. And they fault the Court of Appeals for responding to this argument in the same manner as the Temporary Emergency Court of Appeals responded to a similar argument in *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984): "the question is not whether Congress would have enacted th[is] *exact* statute[ ] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[ ], after severance of the legislative veto provision[ ], to no statute[ ] at all." Pet. App. 18a.

Petitioners' contentions, we submit, do not raise any issue which warrants consideration by this Court in light of the "[a]mple evidence" that the employee protection program was deemed by Congress to be an important part of the ADA and the contrasting lack of evidence that the veto proviso was regarded as critical. Pet. App. 28a. Thus, the result reached by the Court of Appeals is virtually mandated by the presumption of severability set forth in *Chadha* and reaffirmed in *Regan*. But even if that were not so, the Court of Appeals did not err by considering the severability question based on the likely legislative

intent with respect to the current alternatives. The Court had to choose between severability and inseverability. If inseverability was the choice, it is undeniable that there would literally be "no airline employee protection provision at all" (Pet. App. 19a) in the ADA. To be sure, as the Court of Appeals was undoubtedly aware, Congress could, if it desired to do so, pass new legislation to remedy the deficiency. However, the Court had no reason to believe that this is what Congress would have wanted. Indeed, given the delay involved and the probability that Congress would be preoccupied with other pressing legislative business, the Court had every reason to believe otherwise. Accordingly, the Court's assessment of the situation—as succinctly put in the concurring opinion of Judge Ginsburg—is entirely accurate: "only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions." Pet. App. 29a. As between "excision" and "demolition", the Court quite properly concluded that the choice most consistent with the dominant intent of Congress when it enacted § 43 was preservation of that section without the veto rather than destroying the section in its entirety.

Contrary to Petitioners (Pet. 16-20), this case does not create a conflict in the circuits over the appropriate severability analysis. As Petitioners acknowledge, the underlying issue in the cases they cite is whether Congress would have delegated such broad authority without a veto provision. Pet. 19. *E.g. EEOC* v. *CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) ("whether Congress would have delegated to the President the broad reorganizing authority granted

him by the Act without reserving for itself the one-house veto power . . ."); *McCorkle* v. *United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (whether Congress would have granted the President the power to set congressional, executive, and judicial salaries without a veto restriction). So here, as the Court of Appeals framed the issue—*i.e.*, whether "it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality" (Pet. App. 19a)—the question likewise is whether Congress would have granted the rule-making authority it did in § 43 without a veto provision. As we now show, the appellate court's review of the legislative history left little doubt that enactment of § 43 did not hinge on inclusion of the veto proviso, and does not justify further review by this Court.

II. The Court of Appeals Correctly Concluded That Congress Would Have Preferred The Employee Protection Plan of § 43 With The Veto Proviso Severed Out To An Airline Deregulatory Statute Stripped Of Any Employee Protection Plan

The "numerous comments" in the committee reports and in floor debate cited by the Court of Appeals (Pet. App. 20a-23a) fully support the Court's conclusion that Congress attached considerable importance to the employee protection plan embodied in § 43. By contrast, the Court found that "the only discussion . . . with respect to the veto provision is a solitary comment by then-Representative Elliot Levitas of Georgia expressing approval of the presence of a legislative veto in the provision." Pet. App. 23a. As the Court observed, "this sole source [is] a thin reed for

eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees." *Ibid.*

Nor do the "various items of circumstantial evidence" (Pet. App. 24a) which Petitioners relied on below, as they do here (Pet. 20-22), provide any stronger reed to support their position. Thus, Petitioners contend that a veto proviso was inserted in § 43 because Congress adopted a novel Senate employee protection plan instead of the more traditional House approach. Pet. 21-22. However, as the Court of Appeals pointed out (Pet. App. 27a-28a), the Senate plan offered less protection to employees than did the House approach; hence, it "seems . . . unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy." Pet. App. 28a. Moreover, there is "no evidence" that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." *Ibid.*

Petitioners fare no better with their contention that the importance of the legislative veto proviso in § 43 is demonstated by the fact that a veto proviso appears nowhere else in the ADA. Pet. 21. As the Court of Appeals stated, the ADA is essentially a deregulatory statute in which § 43 stands out as the exceptional regulatory provision; ". . . as a matter of common sense, [it is] the regulatory provision which would be the most likely candidate for inclusion of a legislative veto device." Pet. App. 25a.

Finally, Petitioners urge that the Court of Appeals ignored the significance of the unique combination in § 43 of a "report and wait" proviso and a legislative veto proviso. Pet. 20. The combination may be unique,

but its significance is elusive. The Court of Appeals quite properly regarded it as indicative of understandable Congressional interest, but falling far short of establishing that degree of interest which would make it "evident" that Congress would not have enacted § 43 in the absence of the veto proviso. Pet. App. 25a.

CONCLUSION

For the reasons stated above, the Intervenor Air Line Pilots Association respectfully requests that the petition for *certiorari* be denied.

Respectfully submitted,

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
Counsel for Air Line Pilots Ass'n
**Counsel of Record*

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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DOUGLAS N. LETTER
Attorney

Department of Justice
Washington, D. C. 20530
(202) 633-2217

181-P

QUESTION PRESENTED

Whether the legislative veto provision in subsection (f)(3) of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1552(f)(3), is severable from the remainder of Section 43, which establishes reemployment protection for certain employees of air carriers.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 ..... 6, 9, 11

Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210 ..... 6, 9, 10, 11

EEOC v. *Allstate Insurance Co.*, No. 83-1021 (June 11, 1984) 5

EEOC v. *CBS, Inc.*, 743 F.2d 969 10

EEOC v. *Hernando Bank, Inc.*, 724 F.2d 1188 10

Energy Reserve Group, Inc. v. *Department of Energy*, cert. denied, No. 84-188 (Dec. 4, 1984) 11

Gulf Oil Corp. v. *Dyke*, 734 F.2d 797, cert. denied, No. 84-20 (Oct. 1, 1984) 10, 11

Heckler v. *Edwards*, 465 U.S. 870 5

INS v. *Chadha*, 462 U.S. 919 ..... 3, 4, 5, 6, 7, 9

McCorkle v. *United States*, 559 F.2d 1258, cert. denied, 434 U.S. 1011 10

Muller Optical Co. v. *EEOC*, 743 F.2d 380 10

Page

Cases—Continued:

Regan v. *Time, Inc.*, No. 82-729 (July 3, 1984) 9

Rhode Island Federation of Teachers v. *Norberg*, 630 F.2d 855 10

Scheinberg v. *Smith*, 659 F.2d 476 10

United States v. *Jackson*, 390 U.S. 570 9

Statutes:

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* 1

§ 43, 49 U.S.C. App. 1552 ..... 1, 3, 6, 7, 9

§ 43(a), 49 U.S.C. App. 1552(a) 7, 8

§ 43(b), 49 U.S.C. App. 1552(b) 2, 7, 8

§ 43(c), 49 U.S.C. App. 1552(c) 7, 8

§ 43(d), 49 U.S.C. App. 1552(d) 2, 6, 7

§ 43(e), 49 U.S.C. App. 1552(e) 2

§ 43(f), 49 U.S.C. App. 1552(f) 2, 6, 7

§ 43(f)(1), 49 U.S.C. App. 1552(f)(1) 2, 6

§ 43(f)(3), 49 U.S.C. App. 1552(f)(3) 2, 3, 5, 8

§ 43(h)(1), 49 U.S.C. App. 1553(h)(1) 2

Federal Aviation Act, 49 U.S.C. App. 1301 *et seq.* :

49 U.S.C. App. 1301 9

Page

Statutes—Continued:

49 U.S.C. App. 1371 2
28 U.S.C. 1252 5
28 U.S.C. 1291 5

Miscellaneous:

44 Fed. Reg. 19146 (1979) 3
48 Fed. Reg. 52863 (1983) 4
H.R. Rep. 95-211, 95th Cong., 2d Sess. (1978) 8
S. Rep. 95-631, 95th Cong., 2d Sess. (1978) 8

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BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 766 F.2d 1550, and the opinion of the district court (Pet. App. 30a-37a) is reported at 594 F. Supp. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1985, and the petition for rehearing was denied on September 11, 1985. The petition for a writ of certiorari was filed on November 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, Congress passed the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, in order to free significant aspects of the airline industry from federal regulation. Because of concern that this legislation might have a major impact on airline employees, Congress included in Section 43 of the Deregulation Act (49 U.S.C. App. 1552) several employee protection provisions. Section

43(d) (49 U.S.C. App. 1552(d)) provides that a protected employee of a federally regulated air carrier who is furloughed or otherwise terminated by the carrier (other than for cause) during the 10-year period following the date of enactment of the Deregulation Act (October 24, 1978) shall have a first right of hire with any other carrier that held a certificate under 49 U.S.C. App. 1371 on October 24, 1978.[1] Each such air carrier has a corresponding duty to hire a terminated protected employee, except that the carrier may recall any of its own employees who had been furloughed before hiring a protected employee who had been laid off by another carrier. In addition, subsections (b) and (e) provide—subject to the amount of funds actually made available under appropriation acts—for the payment of monthly benefits to protected employees who have been deprived of employment. 49 U.S.C. App. 1552(b) and (e). However, Congress has not appropriated any funds to implement the latter provision.

Subsection (f)(1) of Section 43 (49 U.S.C. App. 1552(f)(1)) provides that the Secretary "may issue, amend, and repeal such rules and regulations as may be necessary for the administration of [Section 43]." Paragraph (3) of subsection (f) provides that the Secretary shall not issue any rule or regulation in final form until 30 legislative days after it was submitted to the responsible committees of the House and Senate, and a final regulation in turn shall become effective 60 legislative days after it was submitted to Congress unless one House of Congress has passed a resolution of disapproval during that period. The Secretary promulgated final regulations concerning the "first right of hire" provision in

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[1]The term "protected employee" is defined by Section 43(h)(1), 49 U.S.C. App. 1552(h)(1) to mean a person who, on October 24, 1978, had been employed for at least four years by a certified carrier.

Section 43(d) in November 1983 (Pet. App. 45a-60a).[2] The regulations were scheduled to become effective 60 legislative days after they were promulgated (*id.* at 59a).

2. Shortly after the regulations were promulgated in final form, petitioners filed this action against the respondent Secretary of Labor in the United States District Court for the District of Columbia. Petitioners challenged the statute and the implementing regulations on a variety of grounds, including that the statutory subsection establishing a first right of hire was invalid because of the inclusion of a legislative veto clause in the subsection authorizing the promulgation of regulations. Several airline employee unions intervened to support the statute and implementing regulations. The Secretary conceded that the legislative veto provision in subsection (f)(3) is invalid under this Court's decision in *INS* v. *Chadha,* 462 U.S. 919 (1983), but the Secretary took the position that the veto provision is severable from the remainder of Section 43, thereby leaving the first right of hire provision intact (Pet. App. 5a).

On May 17, 1984, the date on which the regulations were to become effective, the district court held that the legislative veto provision was inseverable from the remainder of Section 43. The court therefore invalidated the airline employee protection program in its entirety and enjoined implementation of the regulations. Pet. App. 30a-37a.

3. The court of appeals reversed (Pet. App. 1a-29a). After reviewing the severability principles applied by this Court, particularly in *Chadha* itself, the court concluded that the invalid legislative veto provision must be severed " '[u]nless it is evident that the Legislature would not have

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[2]Proposed regulations had been promulgated in 1979. 44 Fed. Reg. 19146.

enacted those provisions which are within its power, independently of that which is not' " (Pet. App. 16a, quoting *Chadha,* 462 U.S. at 931-932). The court further concluded that petitioners must overcome a presumption of severability because the first right of hire provision "is fully operable as a law" without the legislative veto provision (Pet. App. 16a, quoting *Chadha,* 462 U.S. at 934). Applying these principles, the court found the veto provision to be severable. It found no indication that Congress would have declined to enact an employee protection program without the provision for a one-House veto of implementing regulations, observing that "Congress had a strong, humanitarian desire to provide for airline employee protections" and, by contrast, "expressed relatively little concern about the veto provision" (*id.* at 19a). See generally *id.* at 19a-20a.[3] The court of appeals accordingly remanded the case to the district court to consider petitioners' other challenges to the regulations, which had not been addressed by the district court (*id.* at 28a).

4. On remand, in an opinion dated January 22, 1986, the district court, with one exception, sustained the Secretary's regulations against petitioners' contentions that they were inconsistent with the statute. *Alaska Airlines, Inc.* v. *Brock*, Civ. No. 84-0485 (D.D.C.).[4] The exception concerns Section 220.21(a)(1) of the regulations (Pet. App. 52a; 48 Fed. Reg. 52863 (1983)), which relates to the initial hiring age of flight officers and pilots. The district court remanded the question of the validity of this provision to the Secretary for further consideration in light of petitioners' contention

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[3]Judge Ginsberg, concurring in the judgment, likewise concluded that "[d]eletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress," while a declaration of inseverability "would be far more destructive of the legislature's will" (*id.* at 29a).

[4]We have lodged a copy of the district court's January 22 opinion with the Clerk of this Court.

that the initial hiring age may affect the amount and adequacy of an employee's training and experience, and thereby implicate safety concerns. Slip op. 12-14. After the district court and court of appeals declined to stay the effective date of the regulations, the Chief Justice, by order dated January 27, 1986, denied petitioners' application for a stay of the regulations pending the Court's disposition of the instant certiorari petition. No. A-571.

ARGUMENT

The court of appeals, applying the severability principles of this Court's decision in *Chadha,* correctly held that the legislative veto provision in Section 43(f)(3) of the Airline Deregulation Act of 1978 (49 U.S.C. 1552(f)(3)) is severable from the remainder of Section 43. This holding does not conflict with any decision of this Court or another court of appeals, and it presents no issue of general importance warranting review by this Court.[5]

1. a. In *Chadha,* the Court held that an unconstitutional legislative veto provision is to be severed from the remainder of the statute " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' "

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[5]Petitioners' suggestion (Pet. 7-8 n.5) that the court of appeals did not have jurisdiction of respondents' appeals under 28 U.S.C. 1291 is refuted by this Court's jurisdictional ruling in *EEOC* v. *Allstate Insurance Co.,* No. 83-1021 (June 11, 1984). There, the EEOC took a protective direct appeal to this Court pursuant to 28 U.S.C. 1252 from the district court's holding that the legislative veto provision in the Reorganization Act of 1977 was inseverable from the remainder of the Act. However, the EEOC argued that an appeal from such a holding of nonseverability, which presents a question of legislative intent rather than constitutional law, must be taken to a court of appeals pursuant to 28 U.S.C. 1291. See *Heckler* v. *Edwards,* 465 U.S. 870 (1984). The Court thereafter dismissed the appeal in *Allstate,* thereby making clear that an appeal in a case such as this must be taken to the court of appeals under 28 U.S.C. 1291, not to this Court under 28 U.S.C. 1252.

462 U.S. at 931-932, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). The Court further reiterated the established principle that an unconstitutional statutory provision is "presumed severable if what remains after severance 'is fully operable as a law.' " 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234. The court of appeals adhered to those principles in this case. See Pet. App. 15a-19a.

The court of appeals correctly held (Pet. App. 19a), and petitioners do not dispute, that the first right of hire provision is fully operable as a law if the legislative veto provision is severed. Indeed, contrary to petitioners' apparent assumption, a carrier's obligation to hire protected employees who are furloughed or terminated by another carrier is not dependent upon the issuance of any regulations by the Secretary. The statute itself imposes that obligation. Section 43(d) states, without any reference to implementing regulations, that "[e]ach such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person." 49 U.S.C. App. 1552(d). Because the legislative veto provision applies only to regulations, not to the substantive obligation of the carriers under Section 43(d), it is particularly clear that Section 43 is fully operable as a law without the veto provision.

Similarly, the separate subsection (f), which addresses the issuance of regulations, simply states that "[t]he Secretary *may* issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section." § 43(f)(1), 49 U.S.C. App. 1552(f)(1) (emphasis added). This language would not appear to impose on the Secretary a mandatory duty to issue regulations that, if issued, would be subject to a legislative veto. Nor does Section 43(f)(1) make the effectiveness of the substantive first right of hire

under Section 43(d) contingent upon the issuance of such regulations.[6] Instead, the regulations to which it refers are those necessary for the "administration" of Section 43(d) and the other substantive provisions elsewhere in Section 43. Thus, the text of the Act refutes petitioners' contention that the provision in subsection (f) for a one-house legislative veto of regulations was deemed by Congress to be so central that it is inseverable from Section 43(d), which imposes the hiring obligation on petitioners. *A fortiori*, it is not "evident" that Congress would have refused to enact the valid substantive provisions of Section 43 independently of the legislative veto provision. *Chadha*, 462 U.S. at 931-932.

b. This conclusion is strongly reinforced by the legislative history of Section 43. The employee protection provision is "an integral part of a comprehensive deregulatory regime" (Pet. App. 23a). As the court of appeals concluded after reviewing the legislative history (*id.* at 28a):

> Ample evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

Petitioners devote virtually no attention to this holding or to the court of appeals' careful analysis of the legislative

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[6]By contrast, Congress expressly made the effectiveness of the other employee protection provision in Section 43—the availability of monthly assistance payments and relocation assistance—contingent upon further action by Congress. It provided that entitlement to such payments was to be "subject to such amounts as are provided in appropriation Acts" (§ 43(a), (b) and (c), 49 U.S.C. App. 1552(a), (b) and (c)). The omission of any comparable condition in Section 43(d) reinforces the conclusion that Congress intended it to have independent effect, irrespective of the existence of implementing regulations or the authorization of a legislative veto of such regulations.

history, and they fail to raise any serious doubt about the soundness of the court's conclusions. See Pet. 20-22.

As the court of appeals correctly observed (Pet. App. 20a-21a), both the House and Senate versions of the proposed deregulation legislation contained airline employee protection provisions, and each body deemed such protections important. See S. Rep. 95-631, 95th Cong., 2d Sess. 113-114 (1978); H.R. Rep. 95-211, 95th Cong., 2d Sess. 26 (1978). Moreover, the version of the employee protection plan adopted by the Conference Committee was essentially similar to that proposed by the Senate, which was regarded as the weaker of the two plans. See Pet. App. 21a n.10. Thus, the legislative veto provision was not inserted at the insistence of one House as a condition to its agreement to a stronger protection program proposed by the other House. See Pet. App. 20a-21a, 26a-28a.

As the court further observed, various comments in the legislative history that an employee protection program might prove to be unnecessary apparently were premised on the view that *overall* employment in the airline industry might not be adversely affected by deregulation, and that for this reason the federally funded unemployment benefits under Section 43(a), (b) and (c) might be unnecessary; those comments did not address the question of adverse impacts on particular carriers, to which the first right of hire provision was addressed. See Pet. App. 22a-23a.

Petitioners also rely (Pet. 3-4, 21-22 & n.14) on the fact that the Conference Committee inserted the requirement in Section 43(f)(3) that proposed regulations be submitted to and lay before the respective congressional committees for 30 days before they are published in final form, at which point they then are subject to a formal legislative veto. However, this "report and wait" provision by its terms gives Congress no substantive authority, and it therefore adds nothing to the veto provision itself.

Under these circumstances, it is no more "evident" from the legislative history than it is from the text of Section 43 that Congress would have refused to pass the remainder of the employee protection plan without a legislative veto. Severance accordingly was compelled by this Court's precedents. *Chadha,* 462 U.S. at 931-932; *Buckley,* 424 U.S. at 108.[7]

2. Petitioners contend (Pet. 11-16), however, that the court of appeals utilized an incorrect test for determining whether the legislative veto provision is severable. Petitioners simply ignore the fact that the court of appeals quoted at length (see Pet. App. 15a-18a), and then faithfully applied (see *id.* at 19a-28a), the principles of severability followed by this Court in *Chadha* and *Regan* v. *Time, Inc.,* No. 82-729 (July 3, 1984), slip op. 11 (plurality opinion), which in turn were drawn from this Court's prior decisions in *Buckley* and *Champlin Refining Co.*[8] In particular, the court of appeals, like this Court in each of the decisions just cited, posed the central question to be whether " 'it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (Pet. App. 16a). Moreover, although petitioners contend (Pet. 16-20) that the decision below conflicts with decisions of other courts of appeals, the three court of appeals decisions relied upon by petitioners in

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[7]Petitioners also attempt to gain support (Pet. 14-15 n.7) from the lack of a severability clause covering Section 43. However, as the court of appeals noted (Pet. App. 16a-17a n.7), it is not at all clear that the pre-existing severability clause in the Federal Aviation Act, 49 U.S.C. App. 1301, is inapplicable to Section 43 or that Congress believed it to be inapplicable. In any event, the court of appeals properly recognized (Pet. App. 16a n.7) that the "ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson,* 390 U.S. 570, 585 n.27 (1968).

[8]Petitioners concede (Pet. 11-16) that the principles announced in these decisions are controlling here.

which the court actually resolved the question of the severability of a legislative veto provision all applied precisely this same test drawn from *Champlin Refining Co.* See *EEOC* v. *CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) (cited at Pet. 17); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) (Pet. 18); *McCorkle* v. *United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (Pet. 18-19).[9] The remaining two court of appeals decisions cited by petitioners (Pet. 18, 19) addressed the severability of unconstitutional provisions of a *state* statute; they did not involve a legislative veto provision in a *federal* statute, as here. Nonetheless, one of the two decisions again explicitly followed *Champlin Refining Co.* (see *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 855, 863 (1st Cir. 1980)), and the other did not suggest a different approach (see *Scheinberg* v. *Smith*, 659 F.2d 476, 481-482 (5th Cir. 1981)).

Petitioners apparently premise their argument that the court below applied an erroneous test of severability on the following statement in its opinion: " 'the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all' " (Pet. App. 18a (emphasis and brackets in original), quoting *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (T.E.C.A.), cert. denied, No. 84-20 (Oct. 1, 1984). Contrary to petitioners' contention (Pet. 8-10, 11-12, 16, 19-20), this observation manifests no departure from settled severability principles, and there was no suggestion by the court below or by the

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[9]In the fourth legislative veto decision cited by petitioners (Pet. 19), the court of appeals did not resolve the question of severability, although there likewise is nothing in its opinion to suggest a different approach to that question. See *Muller Optical Co.* v. *EEOC*, 743 F.2d 380, 387-388 (6th Cir. 1984).

TECA in *Gulf Oil Corp.* v. *Dyke, supra*, that any such departure was intended.[10] Rather, the observation simply gives expression to the two alternatives confronting a court that must rule on a question of severability: the court must either leave the statute in effect with the unconstitutional provision severed, or it must invalidate the statute in its entirety. In either event, the result is not exactly what Congress contemplated when it enacted the statute. Nor is the court free to refashion the law Congress did enact in an effort to replicate exactly what the Court believes Congress would have passed if it had known the legislative veto provision would be held unconstitutional.

Thus, the passage quoted above is but another way of stating the common sense question presented in any severability case: would the legislature have preferred the statute, after severance of the unconstitutional provision, to no statute at all? The court of appeals concluded in this case that Congress clearly would have preferred to retain Section 43 with the legislative veto provision severed. Petitioners have wholly failed to show that that conclusion was erroneous. Moreover, just last Term, this Court denied review in another case in which it was alleged that the observation in *Gulf Oil Corp.* v. *Dyke, supra*, that petitioners challenge constituted a departure from established severability law. See Pet. at 8, 16-17, Reply Br. at 7-9, *Energy Reserve Group, Inc.* v. *Department of Energy*, cert. denied, No. 84-188 (Dec. 4, 1984). There is no reason for a different result here.

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[10]The opinion in *Gulf Oil Corp.* v. *Dyke, supra*, expressly relies on the severability principles of *Buckley* and *Champlin Refining Co.* See 734 F.2d at 803-804.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DOUGLAS N. LETTER
Attorney

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Supreme Court, U.S.
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No. 85-920

IN THE

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OCTOBER TERM, 1985

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WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES Page

Alaska Airlines, Inc. v. Donovan, 594 F. Supp. 92 (D.D.C. 1984) 2, 3, 4

Exxon Corp. v. Department of Energy, 744 F.2d 98 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 576 (1984) 2

Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984) 2

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 1, 2

STATUTES

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982)) 3, 4

Interstate Commerce Act, 49 U.S.C. § 1378 (1982) .. 5

LEGISLATIVE MATERIALS

S. 2493, 95th Cong., 2d Sess. (1978) 4

H.R. 12611, 95th Cong., 2d Sess. (1978) 5

S. Rep. No. 631, 95th Cong., 2d Sess. (1978) 3

124 Cong. Rec. (daily ed. Apr. 19, 1978) 5

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REPLY BRIEF

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1. Far from "faithfully appl[ying]" the principles of severability set forth in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *see* Opposition Brief of Secretary of Labor at 9 ("Op. Br."), this decision represents a major change in the standard that previously has been applied uniformly to determine whether an unconstitutional provision can be severed from the remainder of a statute. Although the court of appeals did introduce its severability analysis by quoting the *Chadha* standard—*i.e.*, a statute is not severable if "it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not," 462 U.S. at 931-32, *see* Pet. App. at 16a—the court immediately thereafter abandoned *Chadha*, embracing a completely different approach and strictly applying it for the remainder of its analysis. On no fewer than four occasions, the court announced

that its test was whether Congress preferred the severed statute to no employee protection program at all, *see* Pet. App. at 19a, 25a, 26a and 28a, with no discussion of how this issue related to the *Chadha* benchmark. Thus, unlike *Exxon Corp. v. Department of Energy*, 744 F.2d 98 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 576 (1984), and *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984), *see* Op. Br. at 11, where the Temporary Emergency Court of Appeals stated a similar severability test as an *alternative* rationale after applying *Chadha*, this case squarely presents the question whether a court can sustain a statute simply because it concludes that the law without the unconstitutional provision is better than no law at all.

2. The district court, applying traditional severability analysis, invalidated Section 43 because the language, purpose and legislative history of the employee protection program and the entire Airline Deregulation Act demonstrated convincingly that "Congress would not have enacted § 43 in its present form without [a veto] provision." *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 95 (D.D.C. 1984). The Secretary of Labor readily concedes the critical point that the severed statute is not what Congress contemplated, Op. Br. at 11, but asserts that the statute should nevertheless remain in force because it is better than "no statute at all." *Id.* This test for severability, while perhaps more convenient to apply because it turns on the "importan[ce]" of the legislation, Op. Br. at 8, rather than an inquiry into whether Congress would have enacted "those provisions which are within its power," 462 U.S. at 932, creates a dangerous precedent because, as this case demonstrates, it permits a court to sustain part of a statute in a form that Congress would never have enacted independent of the unconstitutional provision.[1]

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[1] The court of appeals also employed the shortcut of a presumption that a statute is severable if the remaining provisions are

3. The outcome of this case turned entirely on the severability standard the court adopted. If the court had considered whether Congress would have enacted Section 43 in the particular form it did without retaining a veto, petitioners would have prevailed. The legislative history of the Deregulation Act makes clear that Congress was not in a position to foresee the nature or cost of the employee protection program or the problems that it might cause in a deregulated environment. *See* 594 F. Supp. at 95. Congress included the veto provision in Section 43 (and nowhere else in the Deregulation Act) because given its commitment to deregulation and its uncertainty about the effect of the Act on employment, it would not unequivocally authorize the Department of Labor ("DOL"), an agency with little experience with the airline industry or with the congressional aviation committees that drafted the Deregulation Act, to create an expansive regulatory program without preserving Congress' ability easily and quickly to nullify any regulatory excesses that could undermine the very purpose of the legislation. *See* S. Rep. No. 631, 95th Cong., 2d Sess. 113 (1978). The Deregulation Act conferred more than twenty-five delegations of authority, many of which created programs at least as "regulatory" as Section 43,[2]

"operative as law." Pet. App. at 18a. But whether a statute is "operative" without the invalid provision is not particularly enlightening in the severability analysis of a statute containing a legislative veto because a veto is by definition the capacity to negate the operation of an authority delegation, and the removal of the veto obviously does not interfere with the initial functioning of the delegation.

[2] The court of appeals erroneously assumed that Section 43 was the only "regulatory provision" in an otherwise "deregulatory statute." *See* Pet. App. at 25a. Among the other regulatory delegations were: the Civil Aeronautics Board's ("CAB") duty to implement a program ensuring adequate air service to small communities (Pub. L. No. 95-504, 92 Stat. 1705, § 33 (92 Stat. 1732-36)); the CAB's authority to oversee and issue rules modifying a controversial automatic entry program (*id.* § 12, 92 Stat. 1716-18); the Federal Avia-

but only the Section 43 delegation to DOL was subject to a legislative veto. Moreover, while the Conference Committee was strengthening Congress' oversight responsibilities with respect to the Section 43 delegation to DOL, it deleted completely its veto capability over the "automatic entry program"—a highly controversial program that gave the Civil Aeronautics Board ("CAB") wide discretion over one of the most important features of the Deregulation Act.[3] These facts, coupled with the observation that the "elaborate" veto provision is unique among the nearly two hundred statutory legislative veto provisions enacted by Congress, 594 F. Supp. at 95, were critical in the district court's determination that Congress would not have granted such a broad delegation to the Secretary of Labor without retaining a veto power over the program he developed. *Id.* The significance of this evidence, however, was lost when the court of appeals focused on the "importance" Congress placed on creating *some* type of employee protection program, *see* Pet. App. at 23, instead of determining whether Congress would have enacted this *particular* type of program without the legislative veto as a check on DOL's program. *See* Pet. App. at 23a-28a.

4. Respondents' opposition brief completely mischaracterizes the significance of the Conference compromise.

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tion Administration's duty to establish certain aircraft safety standards (*id.* §§ 5 and 33, 92 Stat. 1709, 1738-39); and the CAB's obligation, under revised procedures, to consider applications for route certification (*id.* §§ 7 and 8, 92 Stat. 1711-12).

[3] The automatic entry program allowed airlines to add and subtract a limited number of routes from their current schedules without CAB approval, and the Senate bill gave the CAB an "emergency modification" power to intervene and modify the program, subject to a sixty legislative day one-house veto provision. S. 2493, 95th Cong., 2d Sess. § 5 (1978). While the delegation to the CAB was enacted, the legislative veto provision was deleted in Conference, leaving Section 43 with the only legislative veto in the entire Act.

The important point is not that one house of Congress had proposed a "stronger" employee protection plan than the other, *see* Op. Br. at 8, but that the Senate proposal was a radical departure—both in the breadth of coverage and the extent of the benefits offered—from the types of employee protection plans Congress had enacted before. The House proposal, which did not contain a legislative veto, was long established in other regulated transportation industries and involved attaching case-specific labor protections as conditions on the receipt of some government benefit or regulatory approval. H.R. 12611, 95th Cong., 2d Sess. § 32 (1978). In fact, the House bill contained an employee protection authorization similar to that which the CAB had already been relying on for years when approving individual mergers and consolidations in the airline industry under the Interstate Commerce Act, 49 U.S.C. § 1378 (1982). By contrast, the duty to hire and compensation schemes incorporated in the Senate bill, which were substantially enacted as Section 43, applied industrywide, were not tied to specific government or carrier actions, and constituted a new and controversial intrusion into the labor market. The only non-controversial element of the Senate approach was the veto provision, which was included in the Committee bill and every floor amendment. *See* 124 Cong. Rec. S5876 (daily ed. Apr. 19, 1978) (amendment by Sen. Zorinsky); *id.* at S5882 (amendment by Sen. Danforth). The Conference compromise was significant because it graphically demonstrated Congress' reluctance to go forward with an untested form of employee protection on such a broad scale without a significant check on the program developed by the Secretary of Labor. The Conference manifested that concern by not only retaining a legislative veto but actually strengthening congressional involvement by adding a thirty-day report and wait requirement.

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the District of Columbia Circuit announced an unprecedented standard for determining whether the unconstitutional portion of a statutory provision may be severed, allowing the balance of the provision to survive. The court dismissed the traditional approach of analyzing the legislative intent to ascertain whether, in the absence of the invalidated provisions, Congress would have enacted the remaining provisions as it did. Instead, the D.C. Circuit would declare the remaining portions valid unless the challenging party can prove that Congress would have preferred *no* legislation in the subject area at all. The questions thus presented are:

1. Did the D.C. Circuit err by establishing a severability standard that would allow the remaining statutory provisions to survive despite their conceded inconsistency with congressional intent and notwithstanding substantial evidence that Congress would have enacted different statutory provisions had it known that a certain portion was invalid?

2. Did the court of appeals err in holding that a legislative veto provision in the employee protection provision of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982), is severable from the remainder of that section simply because the court concluded that Congress would have preferred some legislation on the subject to no employee protection at all?

PARTIES TO THE PROCEEDINGS

Petitioners are Alaska Airlines, Inc.; American Airlines, Inc.; Capitol Air, Inc.; Delta Air Lines, Inc.; The Flying Tiger Line, Inc.; Midway Airlines, Inc.; Northwest Airlines, Inc.; Ozark Air Lines, Inc.; Piedmont Aviation, Inc.; Trans World Airlines, Inc.; United Airlines, Inc.; USAir, Inc.; Western Air Lines, Inc.; and Wien Air Alaska, Inc.*

Respondents are William E. Brock, individually and as Secretary of Labor (as successor in office to Raymond J. Donovan); United States Department of Labor; the United States of America; and the following intervenors: Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

Amici are Air Florida; Air One, Inc.; Arrow Air, Inc.; Empire Airlines; People Express Airlines, Inc.; and Southwest Airlines Co.

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* In accordance with Supreme Court Rule 28.1, the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioners are set forth in Appendix D to the Petition for a Writ of Certiorari, filed November 27, 1985.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	2
B. Proceedings Below	6
SUMMARY OF ARGUMENT	9
ARGUMENT	
I. THE COURT OF APPEALS ADOPTED AN IMPROPER STANDARD FOR DETERMINING SEVERABILITY	14
A. The D.C. Circuit's Severability Analysis Contravenes Long-Standing Precedent	14
B. The Severability Standard Used Below Violates The Constitutionally-Required Separation Of Powers	17
II. APPLYING ITS ERRONEOUS STANDARD, THE COURT OF APPEALS WRONGLY DISREGARDED DISPOSITIVE EVIDENCE DEMONSTRATING INSEVERABILITY	26

TABLE OF CONTENTS—Continued

Page

A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Was Integral To Section 43's Enactment 28

B. The Legislative History Demonstrates That The Veto Was An Essential Restriction On The Regulatory Authority Granted To DOL.. 34

1. Congress' Uncertainty Over The Effects Of Deregulation On Employment Made Congressional Review A Critical Part Of Section 43 34

2. The Conference Committee Compromise Strengthened The Significance Of The Veto..... 39

CONCLUSION 45

TABLE OF AUTHORITIES

CASES Page

Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985) ..... *passim*
Alaska Airlines, Inc. v. Donovan, 594 F. Supp. 92 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985) ..... *passim*
American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) 14-15
Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 106 S. Ct. 681 (1986) 28
Buckley v. Valeo, 424 U.S. 1 (1976) 14, 20
Califano v. Westcott, 443 U.S. 76, *aff'd on reh'g*, 443 U.S. 901 (1979) 18
Carey v. Population Services International, 431 U.S. 678 (1977) 17
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 16
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) 10, 14, 16, 23
Commissioner of Internal Revenue v. Engle, 464 U.S. 206 (1984) 27
Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) 15, 25
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 28
Daniel v. Paul, 395 U.S. 298 (1969) 44
Davis v. Wallace, 257 U.S. 478 (1922) 10, 24, 28
Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982) 13
EEOC v. Allstate Insurance Co., 104 S. Ct. 3499 (1984) 13
EEOC v. CBS, Inc., 743 F.2d 969 (2d Cir. 1984) 15, 19, 27
EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984) 15, 27
Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 44

TABLE OF AUTHORITIES—Continued

	Page
Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984)	16
Heckler v. Mathews, 465 U.S. 728 (1984)	19
Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985)	14, 23, 25
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	*passim*
In re Application of AeroAmerica, Docket No. 38885 (C.A.B. Apr. 7, 1983) C.A.B. Order No. 83-4-36	36
Kokoszka v. Belford, 417 U.S. 642 (1974)	29
McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978)	15, 24
Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961)	17
Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984)	15
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	22
North Dakota v. United States, 460 U.S. 300 (1983)	28
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	18
Philbrook v. Glodgett, 421 U.S. 707 (1975)	29
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	26
Regan v. Time, Inc., 104 S. Ct. 3262 (1984)	18, 20, 23, 25
Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980)	15
Richards v. United States, 369 U.S. 1 (1962)	27
Sloan v. Lemon, 413 U.S. 825 (1973)	17
Spraigue v. Thompson, 118 U.S. 90 (1886)	24
Tilton v. Richardson, 403 U.S. 672 (1971)	14
TVA v. Hill, 437 U.S. 153 (1978)	17-18
United States v. Albertini, 105 S. Ct. 2897 (1985)	19
United States v. Jackson, 390 U.S. 570 (1968)	14
United States v. Locke, 105 S. Ct. 1785 (1985)	19

TABLE OF AUTHORITIES—Continued

Page

Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 16
Washington v. United States, 460 U.S. 536 (1983) .. 17
Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) 20
Zobel v. Williams, 457 U.S. 55 (1982) 14

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 1 2
U.S. Const. art. I, § 7, cls. 2, 3 2
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982)) ..... *passim*
49 U.S.C. app. § 1302(a)(4) 30
49 U.S.C. app. § 1371(d)(7)(D) 42
49 U.S.C. app. § 1552 ..... *passim*
49 U.S.C. app. § 1552(a) 3
49 U.S.C. app. § 1552(b) 3
49 U.S.C. app. § 1552(c) 3
49 U.S.C. app. § 1552(d) 4
49 U.S.C. app. § 1552(f)(2) 5, 6, 31
49 U.S.C. app. § 1552(f)(3) 4, 5, 31
49 U.S.C. app. § 1552(g) 5
49 U.S.C. app. § 1552(h)(1) 3
Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9655 (1982) 30
Education Amendments of 1974, 20 U.S.C. § 246(a)(4) (1982) 31
Energy Petroleum Allocation Act, 15 U.S.C. § 757(e)(3) (1982) 30
Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended in scattered sections of 49 U.S.C. app. (1982)) 24, 42
49 U.S.C. app. § 1301 note 24
Federal Elections Campaign Act, 2 U.S.C. § 438(d) (1982) 30
Interstate Commerce Act, 49 U.S.C. § 11347 (1982) 33, 34-35, 39

TABLE OF AUTHORITIES—Continued

Page

Milwaukee Railroad Restructuring Act, 45 U.S.C. § 907 (1982) 34
National Traffic and Motor Vehicle Safety Act, as amended, 15 U.S.C. § 1410(b) (1982) 31
Northeast Rail Service Act of 1981, 45 U.S.C. § 797b (1982) 34
Rail Passenger Service Act, 45 U.S.C. § 565(b) (1982) 33, 35, 39
Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 (1978) 33
Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984) 19
Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982) 18
Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1004 (1982) 34
28 U.S.C. § 1252 (1982) 8, 13, 14
28 U.S.C. § 1254(1) (1982) 2

LEGISLATIVE AND EXECUTIVE MATERIALS

H.R. 10261, 94th Cong., 1st Sess. (1975) 35
H.R. 13504, 94th Cong., 2d Sess. (1976) 35
H.R. 13742, 94th Cong., 2d Sess. (1976) 35
H.R. 14330, 94th Cong., 2d Sess. (1976) 35
H.R. 14604, 94th Cong., 2d Sess. (1976) 35
H.R. 8813, 95th Cong., 1st Sess. (1977) 3, 34, 35, 38, 40
H.R. 9297, 95th Cong., 1st Sess. (1977) 35
H.R. 9588, 95th Cong., 1st Sess. (1977) 35
H.R. 11145, 95th Cong., 2d Sess. (1978) 35
H.R. 12611, 95th Cong., 2d Sess. (1978) 34, 35, 40
H.R. 3939, 98th Cong., 1st Sess. (1983) 21
S. 2551, 94th Cong., 1st Sess. (1975) 35
S. 3364, 94th Cong., 2d Sess. (1976) 35
S. 3536, 94th Cong., 2d Sess. (1976) 35
S. 3830, 94th Cong., 2d Sess. (1976) 35
S. 292, 95th Cong., 1st Sess. (1977) 35
S. 689, 94th Cong., 1st Sess. (1977) 35
S. 2493, 95th Cong., 2d Sess. (1978) 3, 34, 35, 40, 41, 42
H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978) 41

TABLE OF AUTHORITIES—Continued

Page

H.R. Rep. No. 1779, 95th Cong., 2d Sess. (1978) 41, 44
S. Rep. No. 631, 95th Cong., 2d Sess. (1978) .....*passim*
Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 95th Cong., 1st Sess. (1977) 36, 38-39
Effects of Airline Deregulation; and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 97th Cong., 1st Sess. (1931) 37-38, 41
Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 1st Sess. (1977) 33, 35
The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. (1983).....21, 23, 31, 32
124 Cong. Rec. S5852-85 (daily ed. Apr. 19, 1978).. 35, 36, 37, 40, 42, 43
124 Cong. Rec. H13,446-48 (daily ed. Oct. 14, 1978) 12, 37, 42, 44
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44 Fed. Reg. 19,146 (1979)..... 5
48 Fed. Reg. 52,854-65 (1983)..... 2, 5, 6
50 Fed. Reg. 53,094 (1985) 8-9

MISCELLANEOUS

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The Federalist No. 78 (A. Hamilton) (J. Cooke ed. 1961) 20
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U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986* (106th ed. 1986) 3

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, reversing the district court, is reported at 766 F.2d 1550 (D.C. Cir. 1985), and appears at Appendix ("App.") A (1a).[1] The opinion of the district court is reported at 594 F. Supp. 92 (D.D.C. 1984), and appears at App. B (30a).

JURISDICTION

The opinion and judgment of the court of appeals was entered on July 16, 1985. The court of appeals denied petitioners' petition for rehearing and suggestion for

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[1] By order of this Court, no joint appendix has been printed herein. *See* 54 U.S.L.W. 3662 (U.S. Apr. 7, 1986). Relevant opinions and other portions of the record below were included in petitioners' Appendix to their Petition for a Writ of Certiorari, filed November 27, 1985. Citations to material printed in that Appendix appear as "——a."

rehearing en banc on September 11, 1985. The petition for a writ of certiorari was granted on March 3, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article I, Section 1.

United States Constitution, Article I, Section 7, Clauses 2 and 3.

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982).

Department of Labor regulations under Section 43 of the Airline Deregulation Act of 1978, 48 Fed. Reg. 52,854-65 (1983).

The constitutional provisions, statutes and regulations involved are reprinted in App. C (38a).

STATEMENT OF THE CASE

A. Statutory Background

In 1978, Congress passed the Airline Deregulation Act (hereinafter "Deregulation Act" or "Act"), thereby phasing out economic regulation of domestic aviation to encourage competitive fares, new airline entrants and expanded service. *See* Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C. app. (1982)). With the sunset of the Civil Aeronautics Board ("CAB") in 1984 and the transfer of its few remaining regulatory functions to the Department of Transportation ("DOT"), this transition to a deregulated industry is now largely complete.

Congress anticipated that deregulation would result in an expanded airline industry with increased employment, S. Rep. No. 631, 95th Cong., 2d Sess. 113, 115 (1978) (hereinafter "Senate Report"), a prediction

proved correct over the past eight years.[2] At the time the Deregulation Act was passed, however, a few expressed uncertainty on this score. Thus, as insurance against the "theoretical possibility" that some employees might lose their jobs as a direct result of deregulation, *id.* at 113, Congress authorized an employee protection program ("EPP") that would provide certain benefits for "protected employees" (*i.e.*, employees who as of October 24, 1978, had at least four years of employment with a CAB-certificated interstate airline). Section 43(h)(1), 49 U.S.C. § 1552(h)(1) (1982).

The employee protection provisions proposed by the House were based upon existing transportation industry programs under which benefits were supplied to displaced workers by the employers responsible for the job loss (*e.g.*, as a result of a route termination or a merger). *See* H.R. 8813, 95th Cong., 1st Sess. (1977). The EPP ultimately enacted as Section 43, however, originated in the final Senate bill and was a significant departure from the House's traditional approach. Section 43 required the Department of Labor ("DOL") to establish a novel, untested type of labor protection through a single program with two "closely linked components." 594 F. Supp. at 93 (31a); *see* S. 2493, 95th Cong., 2d Sess. § 22 (1978). Under the first part, if an air carrier experienced severe work force contractions or bankruptcy as a result of deregulation, the carrier's furloughed or terminated "protected employees" were entitled to federally-provided monthly assistance payments and other monetary benefits. *See* Section 43(a), (b), (c), 49 U.S.C. app. § 1552(a), (b), (c) (1982). The second portion of the EPP imposed on airlines certificated by the CAB as of October 24, 1978 ("covered car-

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[2] In 1984, there were 95 certificated airlines, double the number in 1978, U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986* at 616 (106th ed. 1986), and industry employment has increased as well. S. Morrison and C. Winston, *The Economic Effects of Airline Deregulation* 44 (Brookings Inst. 1986).

riers") a duty to hire "protected employees" who were terminated or furloughed by competing airlines.[3] *See* Section 43(d), 49 U.S.C. app. § 1552(d) (1982).

Given congressional uncertainty about the need for labor protection in addition to that already provided by the CAB and about Section 43's inherent inconsistency with the Act's otherwise deregulatory purpose, Congress did not fully develop the EPP. In Section 43(f), Congress directed DOL, a department not otherwise involved in airline deregulation, to promulgate EPP regulations, but it imposed on that delegation a one-house veto and unusually elaborate procedures to ensure ongoing congressional control over the program's evolution. The veto provision, which was not subject to any severability clause, was woven directly into Section 43(f)'s delegation to DOL and applied exclusively thereto. It was the only legislative veto provision in the entire Deregulation Act, which contains numerous other delegations of authority.

The one-house veto provision had always been an integral part of the Senate provision, which expressly provided for a sixty "legislative day" review period to allow either house to disapprove any DOL regulations. Even as it was deleting an unrelated veto provision elsewhere in the Act, however, the Conference Committee strengthened the veto provision in Section 43(f) by adding two more restrictions to the delegated authority. First, it required DOL to promulgate its regulations within six months after the Deregulation Act became law. Second, the Conference bill instructed DOL to submit its proposed rules to the aviation oversight committees in both the House and Senate for a review period of thirty legislative days.[4]

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[3] Since many carriers have been certificated since 1978, these duty-to-hire obligations apply only to some of the certificated carriers now operating.

[4] These committees are the Senate Committee on Commerce, Science, and Transportation and the House Committee on Public Works and Transportation. *See* 49 U.S.C. app. § 1552(f)(3) (1982).

Section 43(f) (2), (3), 49 U.S.C. app. § 1552(f) (2), (3) (1982). With the veto as the ultimate check, each of these provisions would have strengthened Congress' ability to control and shape the specific dimensions of the EPP.

In March 1979, DOL proposed regulations to implement both the government compensation and airline duty-to-hire aspects of the EPP. *See* 44 Fed. Reg. 19,146 (1979). DOL submitted final rules to Congress on January 19, 1981, but withdrew them on February 3, 1981. Then, on November 22, 1983, five years after the statutory deadline, *see* 48 Fed. Reg. 52,854 (1983), and only a few months after this Court declared legislative veto provisions unconstitutional, *see Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), DOL published the final regulations now at issue in this case. Unlike the March 1979 proposal, however, these new DOL regulations attempted to implement only the duty-to-hire portion of the EPP. The government compensation guidelines mandated by Section 43(f) were deleted, placing the entire burden of the EPP solely on the "covered carriers," which account for only about one-third of the DOT-certificated airlines operating today.[5]

Although Congress' intention was to provide protections for employees adversely affected by deregulation, DOL's regulations would establish a preferred class of "designated employees," which includes employees who are terminated or furloughed for any reason other than cause, even if the reason is totally unrelated to deregulation. *See* 48 Fed. Reg. at 52,862. Under the regulations, the "covered carriers" have a mandatory obligation to hire these "designated employees" for any job vacancies (including safety-sensitive positions, such as pilots, flight

[5] DOL still has not proposed any regulations to implement the government compensation provisions of Section 43, and although the statute itself authorized appropriations for this part of the program, *see* Section 43(g), 49 U.S.C. app. § 1552(g) (1982), DOL has not requested that such appropriations be made.

attendants, and mechanics) before considering any other job applicants, even those who are better qualified.[6] Before becoming effective, these regulations were submitted to Congress, but not until several years after the six-month deadline, *see* 49 U.S.C. app. § 1552(f)(2), and not until after Congress' authority to veto had been voided in *Chadha*.

B. Proceedings Below

In February 1984, petitioners brought this action against DOL and shortly thereafter moved for summary judgment, urging that Section 43's legislative veto provision was unconstitutional and that Section 43 should be invalidated in its entirety. DOL and several labor union intervenors then filed cross-motions for summary disposition.[7] On May 18, 1984, the district court (Hon. Gerhard A. Gesell) granted plaintiffs' summary judgment motion. Noting that the invalidity of the veto provision was not contested, the court stated that the only issue before it was whether the invalid veto could be severed or whether Section 43 must fall in its entirety. Judge Gesell concluded that this issue turned

> not [on] whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the re-

[6] The regulations also impose a variety of new notification and reporting requirements. *See* 48 Fed. Reg. at 52,863-64. Further, the rules require covered carriers to wait at least thirty days before filling any job vacancy with an applicant who is not a designated employee, regardless of whether any such employees have applied or are available and without any exception for safety-related positions that must be filled immediately. *See id.* at 52,863, § 220.24.

[7] Intervenors are Air Line Pilots Association, International ("ALPA"); Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America (the latter four hereinafter collectively referred to as "BRAC").

> mainder of the statute merely because it might be an approximation of what Congress would have enacted. The task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself.

594 F. Supp. at 94 n.3 (33a-34a n.3) (emphasis in original). Based on "the content and structure of the . . . Act, the circumstances surrounding its enactment, and its legislative history," the Court held Section 43 invalid in its entirety, finding that the invalid veto provision "is inextricably bound to the remainder of that section and that Congress would not have enacted the remainder of [Section] 43 in its absence." *Id.* at 96 (37a) (footnote omitted).[8]

On July 16, 1985, the court of appeals reversed, setting forth a different, unprecedented standard under which the legislative veto provision was found to be severable from the balance of Section 43. Instead of asking whether Congress would have enacted the remaining provisions of Section 43 as it did if it had known the one-house veto was unconstitutional, the court declared that the remaining parts of the statute must be held valid unless "the challengers . . . show that it is evident that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision." 766 F.2d at 1561 (19a). *See also id.* at 1560 (18a), 1563 (25a), 1564 (26a) and 1565 (28a).

Pursuant to this standard, the court of appeals dismissed as irrelevant considerable evidence that the veto provision was an integral limitation on DOL's delegated authority and that Congress would not have enacted the remaining provisions in the form it did absent the veto. Such evidence, the court concluded, does not "speak to whether Congress would have preferred no employee pro-

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[8] The district court, however, found that Section 43 was severable from the balance of the Deregulation Act. 594 F. Supp. at 96 n.5 (37a n.5).

tection plan at all . . . ." *Id.* at 1563 (25a); *see also id.* at 1565 (28a). As a result, based on the general observation that Congress "desire[d] to provide for airline employee protection," the court declined to nullify Section 43 in its entirety. *Id.* at 1561 (19a).[9]

After denying petitioners' motion for rehearing, suggestion for rehearing en banc, and motion to stay the mandate pending Supreme Court review, the court released its mandate on October 9, 1985.[10] After petitioners filed a petition for writ of certiorari on November 27, 1985, DOL published notice that its regulations would become effective on January 27, 1986. *See* 50 Fed. Reg.

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[9] Pursuant to 28 U.S.C. § 1252 (1982), BRAC filed a direct appeal and application for a stay of judgment pending appeal in the Supreme Court of the United States. On May 23, 1984, Chief Justice Burger, acting as Circuit Justice, denied BRAC's stay application, and BRAC later withdrew the appeal before the Supreme Court determined whether it had exclusive jurisdiction.

[10] The court of appeals also remanded the case to the district court for consideration of other grounds on which petitioners had challenged the statute and regulations. On remand, the district court ruled on January 22, 1986 that § 220.21(a)(1) of the regulations, which prohibits airlines from imposing initial minimum hiring age requirements for pilots and flight crew, was invalid because DOL failed adequately to address its impact on airline safety. Concluding that "the Airlines' concern [in this regard] is a substantial one," *Alaska Airlines, Inc. v. Brock*, No. 84-0485, slip op. at 13 (D.D.C. Jan. 22, 1986), the district court remanded that issue to the Secretary of Labor for further consideration. *Id.* at 13-14. The remaining sections of the regulations were found to be valid. On January 23, 1986, petitioners filed a notice of appeal and a motion to stay the effective date of the regulations pending appeal of the district court's determination on the remaining sections of the regulations. The district court denied the stay motion on January 24, 1986, and similar motions were denied by the court of appeals and the Chief Justice (acting as Circuit Justice) on January 25 and January 27, respectively. On February 7, 1986, ALPA filed a notice of cross-appeal. These actions are now pending in the court of appeals.

53,094 (1985). The Court granted a writ of certiorari on March 3, 1986.[11]

SUMMARY OF ARGUMENT

The D.C. Circuit formulated in this case a completely new standard for determining whether a statutory provision should survive when integral parts thereof are declared unconstitutional. Under that test, an invalid portion of a statute may be severed unless it is proved "that Congress would have preferred no [statute] at all to the existing provision *sans* the veto provision." 766 F.2d at 1561 (19a). Applying this standard, the court of appeals concluded that the employee protection provisions in Section 43 of the Deregulation Act should survive the invalidation of its legislative veto portion even though there is no reason to believe that absent the veto, Congress would have adopted the remaining parts of the section and the substantial and unguided regulatory discretion they allow.

The severability issue in this case is not, as the court of appeals approached it, whether Congress would have enacted some form of protection for airline employees without retaining a veto power over DOL's program. *See* 766 F.2d at 1560 (18a), 1561 (19a), 1563 (25a), 1564 (26a), and 1565 (28a). Petitioners do not dispute that Congress wanted a limited "insurance" program for airline employees harmed by deregulation or that some type of employee protection probably would have been enacted without a veto. Under a chain of decisions unbroken over fifty years, however, the relevant issue is whether Congress would have enacted *this* employee protection program, delegating to DOL the general authority

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[11] Following the issuance of a writ of certiorari on March 3, 1986, the court of appeals recalled its mandate pending review in this Court, and DOL suspended its program. On motion by DOL and ALPA, the court of appeals then reissued its mandate on May 9, 1986.

it did, without the ultimate check of a legislative veto to ensure considerable congressional control over and involvement in DOL's development of the program. *See, e.g., Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

The D.C. Circuit's new test was prompted by a manifest eagerness to decide this case with a mechanical formula, negating the need for a careful analysis of legislative intent. But the test defies logic, setting such an exacting standard that severability is the pre-ordained result. Moreover, by allowing judicial reconstruction of the statute without regard to the will of Congress, the test violates the constitutionally-mandated separation of powers. *See, e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944-51 (1983). It improperly allows a court freely to sever invalid provisions, leaving on the books anything that in the court's view vaguely advances a broad congressional purpose. Further, as is the case here, the statutes which survive under this standard may improperly grant a delegation of authority broader than Congress itself enacted or would have permitted. *See, e.g., Davis v. Wallace*, 257 U.S. 478, 484 (1922). The use of this erroneous standard caused the court below to disregard valid evidence that under this Court's traditional analysis would have demonstrated inseverability. For example:

(1) In mandating airline deregulation in 1978, Congress anticipated expanded employment in that industry. Nevertheless, as an "insurance policy" against any job contractions, Congress ultimately authorized an EPP. Because of uncertainty about the need for such a program and because interest in employee protection arose late in the Deregulation Act's evolution, however, Congress left essential aspects of the EPP undefined. Responsibility for proposing a specific design of the program was delegated to the administrative process, but only with the guarantee that each house of Congress would

have multiple opportunities for detailed involvement in molding the program and the ultimate power to veto whatever DOL proposed.

(2) The House deregulation bill provided for labor protections traditionally used in transportation industries, providing benefits to employees of specific firms affected by certain government-approved private transactions (*e.g.*, mergers). In contrast, the provisions in the Senate bill were more pervasive, creating an industry-wide EPP that was not limited to particular transactions. Further, the Senate bill (a) promised an undefined amount of federally-provided monthly assistance payments and (b) required covered carriers to give hiring priorities to employees terminated by competing carriers.[12] Because the EPP provisions authorized potentially significant government expenditures and imposed heavy regulatory burdens on certain air carriers, contradicting the overall deregulatory purpose of the Deregulation Act, Congress reserved the veto power over DOL's regulations.

(3) Among the numerous delegations of administrative authority in the Deregulation Act, implementation of the EPP was the only responsibility given to DOL. That department's dedication to deregulation was open to doubt, and DOL was not within the jurisdiction of the congressional committees charged with airline industry oversight. Thus, the veto provision ensured congressional control over the proposals of an agency not otherwise involved in airline deregulation.

(4) In choosing the Senate EPP over the House version, the Conference Committee failed to resolve key elements of the program but retained for each house the legislative veto. This action is highly significant be-

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[12] As noted previously, however, the burdens of the program were placed only on certain carriers. *See supra* at 3.

cause the Committee simultaneously struck a legislative veto provision elsewhere in the Act, leaving Section 43 as the only one of many delegations of authority in the lengthy, complex Deregulation Act subject to veto power. In addition, the Conference Commitee substantially strengthened the control of each house over the development of the EPP by adding two additional legislative review procedures. The Conference bill instructed DOL to follow a three-step procedure: (a) promulgate regulations within six months, (b) submit its proposed rules to the congressional committees responsible for aviation oversight for thirty legislative days, and (c) delay the effective date of its final rules for an additional sixty legislative days to allow either house of Congress to veto them. In persuading the House to acquiesce in the Senate approach, Rep. Levitas, a principal architect of the Act, confirmed that Congress would "have the final word on the regulations." 124 Cong. Rec. H13,448 (daily ed. Oct. 14, 1978).

(5) As the court of appeals observed, this three-step review "provision reflects, as a whole, a unique combination of features" among the over 200 legislative veto provisions Congress has included in various statutes. 766 F.2d at 1563 (25a). Other statutes may contain some of these review steps, but Section 43 is distinctive in that it contains all three. Significantly, these provisions (including the veto) are integral and exclusive parts of the same subsection which delegates regulatory power to DOL. Thus, having left unresolved essential elements of the program, Congress designed an extensive and unprecedented review process that would guarantee each house maximum control over the EPP's design and implementation.

By adopting a severability standard that obviated the need for careful examination of all circumstances sur-

rounding the passage of Section 43, the court of appeals disregarded these and other relevant factors. The language, structure and purpose of Section 43 as well as its legislative history demonstrate that Congress would not have granted DOL the power to implement this broad, untested form of employee protection in the form it did without retaining a legislative veto. To permit the remaining provisions of Section 43 to remain in force, without the veto, is to permit, as the government concedes, a statute with language and effects not intended by Congress. DOL Br. in Opp. at 11. The veto provision is thus inseverable from Section 43.[13]

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[13] The court of appeals also improperly rejected petitioners' contention that the appeal of the district court's decision should have been brought directly in the Supreme Court, not the court of appeals. *See* 766 F.2d at 1554-56 (6a-9a). Under 28 U.S.C. § 1252, the Supreme Court has jurisdiction over appeals from district court decisions holding federal statutes unconstitutional in civil actions to which the government is a party. Since Judge Gesell held Section 43 unconstitutional in its entirety, *see* 594 F. Supp. at 96 (37a), and the other conditions of Section 1252 were met, the Supreme Court had exclusive jurisdiction over the appeal. *See Donovan v. Richland County Assn. for Retarded Citizens*, 454 U.S. 389 (1982). The court of appeals lacked jurisdiction, and for that reason alone, that court's decision must be vacated. *Id.* at 390.

This Court refused to accept jurisdiction in another legislative veto case, *EEOC v. Allstate Insurance Co.*, 104 S. Ct. 3499 (1984), but it gave no reasons. The issue presented there, however, is distinguishable because it involved a challenge to the *remedy* ordered by the district court, not a challenge to the court's holding that the statute in question was unconstitutional. *See id.* at 3499 (Burger, C.J., dissenting). Appellants below did not merely appeal the remedy ordered by Judge Gesell, but instead directly challenged his conclusion that Congress' attempt to share with the Executive the responsibility for shaping an EPP was so

ARGUMENT

I. THE COURT OF APPEALS ADOPTED AN IMPROPER STANDARD FOR DETERMINING SEVERABILITY.

A. The D.C. Circuit's Severability Analysis Contravenes Long-Standing Precedent.

Since 1932, this Court has determined the severability of invalid statutory provisions under one standard: If a portion of a statutory section is declared unconstitutional, the entire section must fall if "it is evident that the legislature would not have enacted *those provisions* which are within its power, independently of that which is not." *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932) (emphasis added). *See, e.g., United States v. Jackson*, 390 U.S. 570, 585 (1968) (quoting and applying *Champlin Refining*); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (same); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (same); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 931-32 (1983) (same); *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (citing *Champlin Refining*); *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985) (same).[14] In

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intertwined with the other portions of Section 43 that the entire section was unconstitutional. *See* DOL App. Br. at 1-2. This Court has recognized that if an entire statute is invalidated because it contains an unconstitutional part, the constitutionality of the *entire statute* is at issue. *See, e.g., Chadha*, 462 U.S. at 931 (issue is whether "§ 244 in its entirety is violative of the Constitution"). This case, therefore, is squarely within the scope of Section 1252.

[14] Prior to the decision herein, the federal courts of appeals, including the D.C. Circuit, consistently applied this standard, particularly where the severability of an invalid legislative veto provision was at issue. For example, in two relatively recent legislative veto cases, the D.C. Circuit noted that " 'the crucial inquiry [is] whether Congress would have enacted other portions of the statute in the absence of the invalidated provision.' " *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 307 (D.C. Cir.

other words, a statutory section containing an invalid provision must fall in its entirely if it appears that absent the invalid part, Congress would have enacted *either* no provision at all *or* one with different form, content or language.

Applying the *Champlin Refining* standard, the district court herein had no doubt that the legislative veto provision in Section 43 was inseverable, finding it readily apparent from the Deregulation Act's "content and structure," legislative history, and surrounding circumstances that Congress would not have enacted the other parts of Section 43 without the veto provision. 594 F. Supp. at 96 (37a). On review, the court of appeals introduced its severability analysis with the same *Champlin Refining* standard. *See* 766 F.2d at 1559 (16a). But immediately thereafter, the court abandoned that approach, embracing a radically different standard that led inexorably to reversal of the decision below. The court declared repeatedly that those arguing for inseverability had the burden of showing "that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision." *See*

1982) (quoting *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983)). *See also EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) (issue is "whether Congress would have delegated to the President the broad reorganizing authority granted him by the Act without reserving for itself [a] one-house veto"); *Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984) (issue is "whether Congress would have passed the statute absent the offending [legislative veto] provision"); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) (issue is "whether Congress would have enacted the remainder of the statute in the absence of the invalid [legislative veto] provision"); *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). *See also Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 863 (1st Cir. 1980) (issue is "whether the legislature would have enacted [the valid portion] independently of the [unconstitutional portions]").

id. at 1561 (19a). *See also id.* at 1563 (25a), 1564 (26a) and 1565 (28a).

This cannot be the proper test. The standard is not only unprecedented,[15] it is wholly illusory, supplying no meaningful guidance. It amounts to little more than a tautological inquiry into whether Congress wanted to enact a statute on the subject, a non-probative fact readily apparent from the statute's existence. But more fundamentally, the test blithely ignores the tenet underlying all severability analysis: "What was the intent of the lawmakers?" *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936).

The required inquiry is whether "the legislature would have been satisfied *with what remained.*" *Champlin Refining*, 286 U.S. at 235 (emphasis added).[16] Yet, the

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[15] In its decision, the D.C. Circuit relies upon a severability analysis articulated by the Temporary Emergency Court of Appeals in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984). But the court in *Gulf Oil* did not hold the statute severable exclusively on the theory that Congress would have preferred the modified version to nothing at all. Based on an examination of the legislative history, the court first held that the statutes under review (two energy policy acts) would have been enacted without the veto provisions. *See* 734 F.2d at 804. In contrast, the D.C. Circuit in this case asked only whether Congress would have preferred no employee protection at all if it could not have retained a veto power, failing even to consider whether Congress would have enacted this *particular* statutory section (and its broad delegation to DOL) had it known that the legislative veto device would not be available as a limitation on that delegation. Moreover, unlike the *Gulf Oil* case in which plaintiffs sought invalidation of the entire scheme of federal oil price regulation as embodied in two comprehensive acts, the issue here is whether the legislative veto can be severed from the statutory section to which it exclusively applied, leaving the rest of the Deregulation Act intact.

[16] Or as expressed in a decision rendered the same day as *Champlin Refining*, if a court concludes "that the legislature would not have been satisfied with the statute unless it had included the invalid part," it must hold the law to be nonseverable. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932).

D.C. Circuit's approach considers legislative intent in only the broadest possible terms, merely making a simplistic examination of whether the challenged statute is "important" and evading the real issue of precisely what (if anything) Congress would have wanted to survive partial invalidation. DOL Br. in Opp. at 8.

As the district court observed, this analysis permits courts to "enforce the remainder of [a] statute merely because it might be an approximation of what Congress" had in mind. 594 F. Supp. at 94 n.3 (34a n.3). For example, in this case, Congress delegated authority to DOL with explicit limitations (*e.g.*, the legislative veto). But as the Secretary of Labor concedes, DOL Br. in Opp. 11, by removing the veto limitation, the D.C. Circuit has expanded DOL's authority beyond Congress' original grant. Under *Champlin Refining*, the controlling question is whether Congress would have been willing to confer such expanded power on DOL had it known that the veto provision it purposefully and specifically imposed on the delegation of authority was invalid. The D.C. Circuit's standard, however, obviates any inquiry into that issue and thus improperly allows the judiciary to reformulate statutes to create laws which are not at all what Congress contemplated. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (severability not permitted where the remaining provisions would "create a program quite different from the one the legislature actually adopted"); *Washington v. United States*, 460 U.S. 536, 543 n.7 (1983) (discussing *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961)); *Carey v. Population Services International*, 431 U.S. 678, 708-09 n.2 (1977) (Powell, J., concurring and concurring in judgment) (quoting *Sloan*).

B. The Severability Standard Used Below Violates The Constitutionally-Required Separation Of Powers.

Once a court has performed its singular duty of determining whether a particular statute contravenes the Constitution, it should stop. *See TVA v. Hill*, 437 U.S.

153, 194-95 (1978) (citations omitted) (Once the "constitutionality [of a statute is] determined, the judicial process comes to an end. . . . [T]he commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'"). Rejecting as irrelevant evidence that Congress would not have enacted the remaining portions of Section 43 as it did without the invalidated provisions, 766 F.2d at 1560-65 (15a-28a), the court below sought to preserve the balance of the section because generally "Congress had a strong humanitarian desire to provide for airline employee protection." *Id.* at 1561 (19a). But a court should not strain to preserve a partially invalid statute merely because it believes something is "better than nothing."

If from all indicia it appears that congressional preference would have been for a law other than that which would remain after severance, the responsibility for remedial legislative action should be left where it belongs—with the legislature. *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 n.40 (1982) ("it is for Congress to determine the proper manner of restructuring the [invalidated statute] . . . in the way that will best effectuate the legistive purpose").[17] If Congress wishes to reinstate a statute, it can do so.[18] But Congress should not have to be

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[17] *See also Califano v. Westcott*, 443 U.S. 76, 94-95 (Powell, J., concurring in part and dissenting in part) ("[The Court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than . . . rewriting [the statute], we should leave this task to Congress."), *aff'd on rehearing*, 443 U.S. 901 (1979); *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3290 (1984) (Powell, J., concurring in part and dissenting in part) ("[O]ne may assume that Congress—if necessary—would move promptly to enact a more carefully drawn statute.").

[18] For example, after the Second Circuit invalidated the entire Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982), because it

constantly vigilant for judicially-redrafted statutes and bear the burden of having to take rehabilitative action (*e.g.*, repeal or amendment) against statutory provisions which, as revised, no longer comport with legislative intent.

By authorizing the routine severance of invalid provisions without meaningful examination of whether the judicially-recast statute preserves legislative intent, the D.C. Circuit's severability standard disregards these principles, thereby raising serious separation-of-powers concerns. In its last three Terms, this Court has cautioned repeatedly that a reviewing court is not "license[d] . . . to usurp the policy-making and legislative functions of duly-elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984).

> Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. . . . Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers. . . .

United States v. Albertini, 105 S. Ct. 2897, 2902 (1985).[19] Such judicial restraint is especially important in the context of severability analysis:

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contained an unconstitutional, inseverable legislative veto provision, the court stayed its action for the express purpose of giving Congress the opportunity to take remedial legislative action. *See EEOC v. CBS, Inc.*, 743 F.2d 969, 976 (2d Cir. 1984). Congress responded by reenacting the statute without the veto provision. *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984). Returning partially-invalidated statutes to Congress for remedial action when the reviewing court sees a likelihood that Congress may have enacted a different statute will cause Congress to reconsider certain subjects on which it has already acted. But when such situations occasionally arise, the Court's separation-of-powers analysis makes clear that it is better to place that burden on Congress than to have the courts rewriting statutes. *See infra* at 20-21.

[19] *See also United States v. Locke*, 105 S. Ct. 1785, 1793 (1985) ("the fact that Congress might have acted with greater clarity or

> [C]ourts addressing questions of severability should be guided by Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitations." [20]

Regan v. Time, Inc., 104 S. Ct. 3262, 3275 n.2 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926)).[21]

Clearly, the D.C. Circuit's new severability standard is more easily applied by the courts because it eliminates the need for a painstaking inquiry into legislative intent. *See supra* at 16-17. But this approach creates the same risks of intrusion on another branch of government as does the legislative veto provision that caused the severability issue to arise here in the first place. The con-

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foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"); The Federalist No. 78, at 526 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original):

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

[20] The published views of one member of the court of appeals panel below are inconsistent with this precept of judicial restraint (as echoed in *Chadha*) and may have influenced the result below. *Compare* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 324 (1979) (citations omitted) (rejecting the " 'wooden notion that each branch must "be limited to the exercise of the powers appropriate to its own department and no other" ' "), *with Chadha*, 462 U.S. at 951 (holding that the Constitution seeks "to assure, as nearly as possible, that each branch of government . . . confine[s] itself to its assigned responsibility").

[21] *See also Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part).

straints on legislative activity articulated in *Chadha* should be applied no less stringently to the judiciary. As is the case with the legislative veto, the D.C. Circuit's severability standard "doubtless [is] . . . a convenient shortcut; the 'sharing' with the [judiciary] by Congress of its authority . . . is, on its face, an appealing compromise." *Chadha*, 462 U.S. at 958. But "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944. Although efficiency may be achieved by allowing a severed statute to remain on the books notwithstanding its inconsistency with legislative intent, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Id.* at 951.[22]

The court of appeals' intrusion into the legislative sphere was prompted by its eagerness to identify presumptions that would negate the need for a probing assessment of legislative intent. The guiding principle was the court's perception that "*Chadha* presumes severability of the offensive provision if what remains after severance is fully operable as law." 766 F.2d at 1560

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[22] In *Chadha's* wake, Congress has entertained proposals for omnibus severability laws denoting which, if any, legislative veto provisions should be deemed severable. *See, e.g.*, H.R. 3939, 98th Cong., 1st Sess. (1983) (proposed "super sunset" legislation that would have repealed all authority delegations unless reinstated by Congress with or without alternative legislative veto procedures). *See also The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 150 (1983) (statement of Alan B. Morrison) (hereinafter "*Chadha Hearings*"). To date, however, Congress has not adopted any of these proposals. This Court's adoption of the D.C. Circuit's severability approach and its virtually insurmountable standard for inseverability, however, would effectively guarantee the severability of all legislative veto provisions, regardless of legislative intent. Thus, the Court would be acting in Congress' stead.

(17a).[23] Concluding that Section 43 would be operable without its legislative veto, the court of appeals held that to prove inseverability, those challenging Section 43 had to meet the higher burden of showing that Congress would have preferred no employee protection at all "to the existing provision *sans* the veto provision." *Id.* at 1561 (19a). But the court of appeals offered no explanation, logical or otherwise, for why the "operability" presumption should trigger this insurmountable severability standard, a test which obviates any need to examine whether Congress would have enacted the remaining provisions of the statute in the form it did had it known a portion was invalid. *Id.* Moreover, Section 43 (unlike the statute in *Chadha*) is not subject to a severability clause which "gives rise to a presumption" of severability. *Chadha*, 462 U.S. at 932. That a statute may remain "operable" after excision of an invalid provision is entirely fortuitous, providing no insight into legislative intent concerning severability.[24] The *Chadha* "operability"

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[23] The court of appeals also stated that "[o]ur charge is to save as much of the statute as we can." *Id.* at 1560 (18a) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). But the D.C. Circuit's severability approach, preferring presumption formulas to a genuine search for legislative intent, contorts this maxim of statutory construction. As the Court made clear in *Jones & Laughlin*, 301 U.S. at 30, the charge is not to preserve Congress' *language*, but to preserve that body's *authority* to legislate without unwarranted judicial interference. To save statutes in a form inconsistent with congressional intent threatens, not preserves, the role of the legislative branch.

[24] In *Chadha*, the Court perceived a lessened need for inquiry into legislative intent because a severability clause was present, giving "rise to a presumption that Congress did not intend the validity of . . . any part of the Act . . . to depend upon whether the veto clause . . . was invalid." 462 U.S. at 932. Under such circumstances, it is not unreasonable that an invalid provision be "*further* presumed severable" if what remains after severance is workable. *Id.* at 934 (emphasis added). A presumption based solely on operability, however, is illogical when applied to a statutory

presumption is applicable only after legislative intent favoring severability is determined (*e.g.*, from a severability clause),[25] and the presumption is therefore wholly inapplicable here.[26] Moreover, in *Chadha*, even though the severability clause created a presumption of severability, the Court still examined legislative history to ascertain whether Congress would have enacted the *re-*

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provision not governed by a severability clause. The fact that a statute may still function absent its invalid provision does not speak to the real issue of whether what remains would function as Congress would have intended.

[25] None of this Court's post-*Chadha* decisions involving statutes lacking severability clauses applies or even mentions any "operability" presumption. *See Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985); *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (plurality opinion); *id.* at 3273-75 (Brennan, J., concurring in part and dissenting in part); *id.* at 3289-90 (Powell, J., concurring in part and dissenting in part). *Champlin Refining*, the case to which the *Chadha* presumption is attributed, *see Chadha*, 462 U.S. at 934, makes clear that post-severance "operability" is to be considered only *after* legislative intent has been assessed. *See* 286 U.S. at 234 (noting that once a legislative preference for severability is found, "the invalid part may be dropped *if* what is left is fully operative as a law" (emphasis added)).

[26] The question whether a statute is "operative" without an invalid provision is irrelevant to the severability of a legislative veto provision because a veto is by definition the capacity to negate the operation of a delegation of authority, and the removal of the veto therefore obviously would not interfere with the functioning of the delegation. In other words, "[i]t's hard . . . to envision a statutory enactment that probably couldn't be viewed as fully operative, even though the legislative veto was struck down. It would just be a different kind of operation tha[n] Congress contemplated." *Chadha Hearings*, *supra*, at 138 (remarks of Rep. Berman). In this context, allowing an "operability" presumption to be applied regardless of whether a severability clause is present would be tantamount to declaring that all legislative veto provisions are severable. Such a sweeping statement, made without any reference to legislative intent, is precisely the kind of judicial intrusion on congressional authority against which this Court has so frequently warned. *See supra* at 18-21.

maining provisions without the legislative veto. 462 U.S. at 932-34.[27]

In addressing the severability of statutory provisions which, like Section 43, are not governed by severability clauses,[28] this Court has considered carefully the legislative intent, unencumbered by mechanistic presumptions and guided by the *Champlin Refining* inquiry of whether Congress would have been satisfied with what remains

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[27] If a presumption must be applied here, it should favor inseverability. Provisions limiting the operation of a statute, such as Section 43's legislative veto provision, are likely to be inseverable because

> "by rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

462 U.S. at 1014 (Rehnquist, J., dissenting) (quoting *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)). In short, when an invalid statutory provision is intended to "restrict[] a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (citing *Davis v. Wallace*, 257 U.S. 478, 484 (1922)).

[28] There is no severability clause in Section 43 or in the Deregulation Act. Nor is Section 43 subject to the general severability provision enacted in 1958 as part of the Federal Aviation Act ("FAAct"), 49 U.S.C. app. § 1301 note (1982). The Deregulation Act contains numerous provisions that do expressly amend the FAAct, *see* §§ 2-40, 92 Stat. at 1705-47, as well as provisions that amend other federal statutes. *See, e.g.*, § 41, *id.* at 1748 (repealed 1982) (amending the Airport and Airway Development Act of 1970). But unlike these other provisions, the text of Section 43 of the Deregulation Act does not purport to amend the FAAct or any pre-existing federal statute. *See* "codification" note to 49 U.S.C. app. § 1552 (1982) (Section 43 was "enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958."). Thus, Section 43 is not part of the FAAct, and the general severability clause enacted twenty years earlier as part of the FAAct is not applicable to Section 43.

of a partially-invalidated statute. As stated in a decision this Court affirmed less than two weeks after *Chadha*:

> We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. . . . [T]he question is whether Congress would have enacted the remainder of the statute without the unconstitutional provision. . . . We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry.

Consumer Energy Council of America v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) (footnote omitted).

The Court's decision in *Regan v. Time, Inc.*, 104 S. Ct. 3262 (1984), further exemplifies this well-established approach. In assessing the severability of an invalid provision of a statute governing photographic reproduction of currency, the Court was divided on the result, but the entire Court agreed that legislative intent was the key. *See id.* at 3269 (plurality opinion) ("[w]hether an unconstitutional provision is severable from the remainder of the statute . . . is largely a question of legislative intent"); *id.* at 3275 n.2 (Brennan, J., concurring in part and dissenting in part) ("severability is exclusively a question of legislative intent").[29] *See also Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862, 2869 (1985) (making no mention of presumptions and stating that the proper inquiry is "whether the . . . legis-

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[29] The plurality opinion references a general severability presumption, 104 S. Ct. at 3269, but it was not endorsed by a majority of the Court. *See id.* at 3273-89 (Brennan, J., joined by Marshall, J.); *id.* at 3289-90 (Powell, J., joined by Blackmun, J.); *id.* at 3290 (Stevens, J.). In any event, the plurality opinion did not base its conclusion on any presumption, engaging instead in the traditional search for legislative intent under the *Champlin Refining* standard. *See id.* at 3269-71.

lature *would have enacted the statute* without the invalid portion") (emphasis added); *Chadha*, 462 U.S. at 932-34.[30]

As shown in the next section, the content and structure of the Deregulation Act, the circumstances surrounding its enactment, and the legislative history of Section 43 all demonstrate that Congress would not have granted DOL unfettered rulemaking authority without retaining a one-house veto. Under traditional severability analysis, these facts alone would mandate a finding of nonseverability. Only under the court of appeals' test were they not enough. That court also required proof that Congress would have preferred no employee protection plan at all to one lacking a legislative veto over DOL's exercise of the delegated authority, completely ignoring strong evidence that Congress would have preferred to enact something different (*e.g.*, a more specifically-defined EPP or a program authorization with other valid restrictions).

II. APPLYING ITS ERRONEOUS STANDARD, THE COURT OF APPEALS WRONGLY DISREGARDED DISPOSITIVE EVIDENCE DEMONSTRATING INSEVERABILITY.

In finding the legislative veto provision inseverable from the balance of Section 43, the district court properly utilized the full panoply of accepted tools of statutory construction to determine whether, in the absence of a legislative veto, Congress would have enacted the other portions of Section 43 in their present form. Judge Gesell examined the language and structure of the statutory

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[30] *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 100 (1976) (White, J., concurring in part and dissenting in part) (severability "is *entirely* a question of the intent of the state legislature") (emphasis in original).

provisions,[31] the congressional purpose and scheme,[32] the legislative history,[33] and the role of Section 43 in the context of the entire Act.[34] *See* 594 F. Supp. at 95-96 (34a-37a). In so doing, the court identified critical facts demonstrating that Congress would not have delegated DOL rulemaking authority to implement this unprecedented employee protection program without incorporating a congressional review mechanism specifically designed to ensure that the program would be consistent with congressional purpose. *Id.*

On review, the court of appeals denied neither the accuracy of these critical facts nor their validity as indicators of the importance Congress placed on having a legislative veto provision in Section 43. *See, e.g.*, 766 F.2d at 1563 (25a). But because the D.C. Circuit's "exacting" standard looks not to the congressionally-perceived importance of the excised provision in the statutory structure but more generally to Congress' desire to legislate in an area, the court of appeals time after time brushed aside these compelling signals of congressional preference. *See, e.g., id.* (disregarding part of legislative history because it "does not speak to whether Congress would have preferred no employee protection plan at all"). *See also id.* at 1560 (17a-18a), 1561 (19a), 1564 (26a) and 1565 (28a). The proper, traditional analysis of legislative intent, however, shows that the legislative veto provision is inseverable from Section 43 because, although Congress undeniably wanted to provide some type of "insurance" for airline employees, it would not have enacted the EPP in its current form

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[31] *See, e.g., EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984).

[32] *See, e.g., Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217-18 (1984).

[33] *See, e.g., EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984).

[34] *See, e.g., Richards v. United States*, 369 U.S. 1, 11 (1962).

without including the veto provision as an essential check on DOL's development of the program.

A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Was Integral To Section 43's Enactment.

When attempting to divine legislative intent concerning a statute, "one is to look first at [the statute's] language." *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Legislative intent that can be gleaned from a statute's "language must ordinarily be regarded as conclusive." *Id.* at 108. *See also Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986). And the statutory language relevant to determining legislative intent includes portions which have been found invalid:

> It is by a mere figure of speech that we say an unconstitutional provision of a statute is "stricken out." For all the purposes of construction, it is to be regarded as part of the act. The meaning of the legislature must be gathered from all they have said, . . . from that which is ineffectual for want of power, [as well] as from that which is authorized by law.

Davis v. Wallace, 257 U.S. 478, 484 (1922). The structure and language of the Deregulation Act, including the invalid veto provision, strongly indicate that the legislative veto was critical to the calculus that produced Section 43 and that without the veto, Congress would not likely have enacted the employment provisions as it did.

First, viewed in its entirety, the complex and comprehensive Deregulation Act grants or modifies at least 25 distinct delegations of regulatory authority, only one of which was made to DOL. Yet, only DOL's delegation to

implement the EPP was made subject to a legislative veto. The court of appeals found this isolated use of the veto irrelevant because it "still does not speak to whether Congress would have preferred no employee protection program at all." 766 F.2d at 1563 (25a).[35] But under the proper severability standard, this fact is highly relevant. This veto provision was not included simply to satisfy a congressional whim for widespread enactment of legislative veto provisions. As is discussed further below, the delegation to DOL was problematic because that department was not otherwise involved in airline deregulation and was not subject to oversight by the congressional committees responsible for the aviation industry. *See infra* at 38-39. That the DOL delegation was singled out for this treatment evinces a likelihood that Congress would not have enacted the balance of Section 43 as it did without that provision.

Comprehensive examination of the Deregulation Act also shows that Section 43 created a program fundamentally inconsistent with the overall deregulatory purpose manifest throughout the Act.[36] The Deregulation

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[35] The court of appeals also found the presence of a legislative veto in Section 43 to be "hardly surprising" because Section 43 is the only "regulatory provision" in an otherwise "deregulatory" statute. *See* 766 F.2d at 1563 (25a). The premise of this observation is plainly incorrect. It ignores the other 25 "regulatory" delegations which include: the CAB's duty to implement a program ensuring adequate air service to small communities (§ 33, 92 Stat. 1732); the CAB's authority to oversee and issue rules modifying an automatic entry program (§ 12, 92 Stat. 1716); the FAA's duty to establish certain aircraft safety standards (§ 5, 92 Stat. 1709, and § 33, 92 Stat. 1738); and the CAB's obligation, under revised procedures, to consider applications for route certifications (§ 7, 92 Stat. 1711, and § 8, 92 Stat. 1712).

[36] *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (noting that legislative intent analysis should include examination of an act's overall purpose); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (same).

Act has the explicitly stated purpose of placing "maximum reliance on competitive market forces." 49 U.S.C. app. § 1302(a)(4) (1982). Yet, as the court of appeals noted but ignored, 766 F.2d at 1563 (25a), Section 43 stands in striking contrast. It hinders free competition by authorizing new regulations that would displace marketplace hiring decisions and impose costs and burdens on some airlines while exempting their competitors. Thus, recognizing that employee protection provisions were inconsistent with deregulation and could be "justified only in very special circumstances," Senate Report at 115, Congress had good reason to insist that DOL submit its regulations for review to ensure that the program would not thwart the Deregulation Act's overall purpose by overburdening covered carriers. Had Congress known that *Chadha* would render it unable to exercise this control over DOL's development of the program, it likely would have imposed further constraints on DOL's delegation to ensure that the Deregulation Act's basic purpose was not undermined.

Even stronger indications of legislative intent regarding severability come from the language and structure of Section 43 itself. Congress' perception that the legislative veto was integral to Section 43 and the EPP is self-evident from the congressional decision to incorporate the veto provision directly into subsection 43(f), the same provision granting the DOL delegation.[37] The surrounding language in subsection 43(f) also reflects the congressionally-perceived importance of the excised veto. Besides providing for the veto, subsection 43(f) requires that DOL (1) promulgate its regulations within six

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[37] In many statutes, the legislative veto provision is entirely separate from the delegation it governs. *See, e.g.*, Federal Elections Campaign Act, 2 U.S.C. § 438(d) (1982); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9655 (1982); Energy Petroleum Allocation Act, 15 U.S.C. § 757(e)(3) (1982).

months, (2) submit its proposed rules to the House and Senate aviation oversight committees for a thirty legislative day review, and then (3) delay the effectiveness of its final regulations for a period of sixty legislative days during which they are subject to veto by either house. 49 U.S.C. app. § 1552(f)(2), (3) (1982). The legislative veto is thus inextricably intertwined with unusually detailed and mutually reinforcing restrictions on the specific grant of regulatory authority in subsection 43(f).

The court of appeals recognized that this legislative review provision "reflects, as a whole, a unique combination of features" among the almost 200 legislative veto provisions that Congress has placed in federal statutes. 766 F.2d at 1563 (25a).[38] Other statutes may have sixty-day one-house veto provisions, committee report-and-wait provisions, or regulatory deadlines. But in Section 43, Congress combined all three conditions to create

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[38] *See Chadha Hearings*, *supra*, at 24-72 (appended to statement of Hon. Edward Schmults, then Deputy Attorney General of the United States) ("DOJ Study"). The DOJ Study indicates that when the Deregulation Act was passed, Congress had enacted only a few statutes that imposed legislative vetoes on delegations of rulemaking authority, the agency function which most approximates legislative policy-making. *Id.* at 60-66. The highly-sensitive and often controversial subject matter of each of these laws strongly suggests that during the period when the Deregulation Act was considered, Congress did not impose a legislative veto on agency rulemaking in a routine or unthinking manner. Instead, Congress reserved such actions for matters it deemed politically controversial. *See, e.g.*, 20 U.S.C. § 246(a)(4) (1982) (1974 statute authorizing promulgation of certain guidelines relating to school desegregation); 15 U.S.C. § 1410(b) (1982) (1974 statute authorizing regulations requiring automobile passenger restraints other than seatbelts). Moreover, as important and controversial as the policies in these statutes were, Congress was generally content to include in each only a simple one-house or two-house veto, and did not include the elaborate oversight procedures and six-month deadline incorporated in Section 43.

a review procedure that ensured intimate congressional involvement in the development of the EPP. Again, however, the court below found this fact unpersuasive because it did not "speak to" the D.C. Circuit's view of "the issue at hand" (*i.e.*, whether "Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision"). 766 F.2d at 1564 (26a).

The three-part procedure obviously does not prove that "Congress would have preferred no employee protection plan at all." 766 F.2d at 1563 (25a). But it makes clear that Congress would not have granted DOL unfettered authority to issue regulations if it had known the veto provision was invalid. Further, it clearly shows that Congress went out of its way to construct for itself a review process that would provide maximum opportunity to revisit the issues left unresolved in the statute through a "sharing" of program development responsibility between the Executive and Congress. For example, the requirement that DOL submit draft EPP rules to the two aviation oversight committees gave those members of Congress directly responsible for formulating airline deregulation an opportunity to mold the details of the EPP.[39] The requirement that final regulations be

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[39] Contrary to the suggestion of the court of appeals, 766 F.2d at 1564 (25a), the effect of this provision is altered significantly by the removal of the legislative veto. As originally enacted, this was much more than a "report and wait" requirement because with the specter of a legislative veto in the background, DOL knew that its EPP proposals had to conform to the wishes of these committees. With the veto removed, Congress still must be informed about EPP proposals, but the provision is not an effective mechanism for ensuring DOL compliance with congressional policies. *See Chadha Hearings, supra,* at 109 (statement of Rep. Frank) ("[Y]ou can report and consult—and all that is nice and sometimes it is very useful—but the fact is that [the agency] still would have the power to [act] and we couldn't do anything about it.").

promulgated within six months guaranteed that the regulations would be reviewed by essentially the same members of Congress who, through their positions on the aviation committees, shaped the Deregulation Act and understood congressional intent concerning the EPP. Finally, the provision subjecting the final regulations to potential veto for sixty legislative days (*i.e.*, days on which both houses of Congress are in session) gave the two committees a means of presenting their recommendations to each house as a whole, thereby ensuring that DOL would take seriously congressional views expressed during the comment period. Thus, while Congress wanted the program developed quickly, it preserved a substantial amount of the available time for its own participation. These elaborate provisions were intended to establish a partnership between Congress and DOL in shaping the contours of the EPP, which were left vague and ambiguous in Section 43.

This unique congressional review process was critical because Congress was acutely aware that Section 43 authorized a program that was significantly more pervasive than any labor protections previously enacted. EPPs in other statutes had dealt with specific companies, workers, route terminations, and employment dislocations that were a direct result of some private transaction or government approval. *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 709 (1977) (*"Senate Hearings"*) (statement of Robert E. Ginther, Committee staff member).[40] But in Section 43, Congress

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[40] *See, e.g.*, Rail Passenger Service Act, 45 U.S.C. § 565(b) (1982) (railroad should provide "protective arrangements" to employees terminated as a result of a route termination); Interstate Commerce Act, 49 U.S.C. § 11347 (1982) (railroad merger approval subject to surviving carriers providing "fair arrangement" for employees of acquired carrier); Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 (1978) (as to em-

was proposing for the first time an unemployment insurance plan coupled with a system of generous employee re-hire rights that addressed not just "individual firms or individual employees, but rather, the general regulatory structure [encompassing] all of the areas and all the workers in the industry." *Id.* *See also* Senate Report at 208 (Additional Views of Sen. Zorinsky) (characterizing Section 43 as "new and without precedent").

B. The Legislative History Demonstrates That The Veto Was An Essential Restriction On The Regulatory Authority Granted To DOL.

1. *Congress' Uncertainty Over The Effects Of Deregulation On Employment Made Congressional Review A Critical Part Of Section 43.*

As the court of appeals observed, "statements in the legislative history reasonably can be read as evidencing a sense that employee protection was not in fact vital to the crafting of a comprehensive deregulatory regime." 766 F.2d at 1562 (21a). Indeed, most of the airline deregulation proposals introduced in Congress did not contain any employee protection provisions,[41] principally

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ployees in two California counties displaced by forestry policy changes, DOL authorized to make arrangements so that displaced employees would be given full consideration for certain government-related and private sector jobs and be provided certain financial benefits); Milwaukee Railroad Restructuring Act, 45 U.S.C. § 907 (1982); Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1004 (1982); Northeast Rail Service Act of 1981, 45 U.S.C. § 797b (1982).

[41] Beginning in October 1975, seven Senate and ten House bills concerning airline deregulation were introduced in Congress. Of the seven Senate proposals, only the last, S. 2493, contained a comprehensive employee protection plan. On the House side, an EPP did not appear until H.R. 8813, the sixth deregulation bill introduced in that chamber. Three bills subsequently introduced in the House contained no EPP, but the final bill, H.R. 12611, required labor protection similar to that provided in Section 5(2)(f) of the

because the sponsors of deregulation either did not perceive a likelihood of employment reductions or felt that any reductions would be covered adequately by the CAB's existing labor protection authority. *See, e.g., Senate Hearings* at 1847 (statement of Sen. Cannon, Chairman of the Senate Subcomm. on Aviation). Labor protection provisions, however, eventually were added to two of the final deregulation bills introduced in the House. *See* H.R. 8813, 95th Cong., 1st Sess. § 27 (1977); H.R. 12611, 95th Cong., 2d Sess. § 32 (1978). An industry-wide EPP was not proposed in the Senate until its final deregulation bill was introduced in 1978. *See* S. 2493, 95th Cong., 2d Sess. § 22 (1978).

Many members of Congress doubted the need for labor protection, predicting that deregulation would increase airline industry employment. *See, e.g.*, 124 Cong. Rec. S5879 (daily ed. Apr. 19, 1978) (statement of Sen. Cannon) ("I believe we have a bill here which will insure that we will end up with more employees for these various carriers rather than fewer, and that will be true right across the board."); 124 Cong. Rec. S18,798 (daily ed. Oct. 14, 1978) (statement of Sen. Kennedy) ("[T]he indicators are all positive, and employment will continue to increase as the carriers respond to the changes

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Interstate Commerce Act and Section 405 of the Rail Passenger Service Act. *See generally* S. 2551, 94th Cong., 1st Sess. (1975); S. 3536, 94th Cong., 2d Sess. (1976); S. 3830, 94th Cong., 2d Sess. (1976); S. 292, 95th Cong., 1st Sess. (1977); S. 689, 95th Cong., 1st Sess. (1977); S. 2493, 95th Cong., 2d Sess. (1978); H.R. 10261, 94th Cong., 1st Sess. (1975); H.R. 13504, 94th Cong., 2d Sess. (1976); H.R. 13742, 94th Cong., 2d Sess. (1976); H.R. 14330, 94th Cong., 2d Sess. (1976); H.R. 14604, 94th Cong., 2d Sess. (1976); H.R. 8813, 95th Cong., 1st Sess. (1977); H.R. 9297, 95th Cong., 1st Sess. (1977); H.R. 9588, 95th Cong., 1st Sess. (1977); H.R. 11145, 95th Cong., 2d Sess. (1978); H.R. 12611, 95th Cong., 2d Sess. (1978). *Cf.* S. 3364, 94th Cong., 2d Sess. (1976) (proposed codification of CAB's existing authority to impose labor protection when approving individual actions of carriers such as mergers and acquisitions).

and new oppportunities deregulation has brought.").[42] Others expressed general uncertainty over deregulation's effects or foresaw dire consequences. *See, e.g., Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 1034 (1977) ("*House Hearings*") (statement of Rep. Anderson) ("[O]ur action . . . is going to make more jobs and stimulate the industry, but I cannot prove that. And it may not."). *See also* Senate Report at 206 (Additional Views of Sen. Zorinsky).[43]

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[42] These members of Congress proved to be correct. Deregulation has not led to reductions in airline employment, *see* S. Morrison and C. Winston, *The Economic Effects of Airline Deregulation* 44 (Brookings Inst. 1986), and findings by the CAB and DOT suggest that most, if not all, layoffs have been attributable to factors other than deregulation, such as the firing of striking air traffic controllers in 1981, the reduction in air travel during economic recessions, and periods of increased fuel costs. *See, e.g., In re Application of AeroAmerica*, Docket No. 38885 (C.A.B. Apr. 7, 1983) C.A.B. Order No. 83-4-36 at 9-10; *id.*, Comments of the Department of Transportation in the AeroAmerica proceeding (Sept. 3, 1982).

[43] *See also House Hearings* at 1224 (statement of John J. O'Donnell, President, ALPA) ("Because the practical consequences of deregulation are so uncertain, it is difficult to predict with much precision what the impact on airline employees might be."). Although some members of Congress were willing to hazard guesses as to general employment trends after deregulation, none offered to quantify the magnitude of those trends:

> No proponent of [the Senate bill] has been able to accurately estimate how many jobs will be terminated by the full implementation of this legislation . . . [T]he fact is that [the bill's sponsors] do not know—and there is no data available—to determine the full adverse effect of this legislation upon the Nation's airline employees. . . . It is a sad commentary on this bill when we find ourselves providing unemployment benefits for an unknown number of people, in an amount that we cannot quantify. . . .

124 Cong. Rec. S5863 (daily ed. Apr. 19, 1978) (statement of Sen. McGovern).

Reflecting the prevalent uncertainty, the Senate report could conclude only that there was a "theoretical possibility" of "potential" employment reductions of a "temporary" and "transitional" nature. Senate Report at 113, 115. Although Congress believed that the Deregulation Act would "increase the total number of jobs in the airline industry," Senate Report at 113, and would necessarily entail expanded overall employment opportunities for airline employees, it could not be absolutely certain of this result. Section 43 was therefore explained by the Chairman of the Senate Aviation Subcommittee as an "insurance" policy against job contractions. 124 Cong. Rec. S5879 (daily ed. Apr. 19, 1978) (statement of Sen. Cannon).

Because of these uncertainties and the substantial differences of opinion about the extent and type of employee protection needed, Congress left open many fundamental issues for subsequent resolution through administrative action subject to congressional review. These issues included the level of assistance payments for pilots,[44] mechanics, secretaries, accountants and other employment categories, *see* Senate Report at 116-17, and virtually all aspects of the duty-to-hire program, including what constitutes an "occupational specialty," how DOL's nationwide hiring program would operate, what showing would be required to qualify for the hiring preferences, and how conflicts should be resolved between the duty to hire and other legal hiring duties of the airlines (*e.g.*, equal employment opportunity obligations and safety-related job qualification requirements).[45] *See supra* at 30, 32, 33.

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[44] *See* 124 Cong. Rec. S5877 (daily ed. Apr. 19, 1978) (statement of Sen. Zorinsky) (expressing concern that a pilot could receive government assistance up to $100,000 annually under the EPP). *See also* 124 Cong. Rec. H13,448 (daily ed. Oct. 14, 1978) (statement of Rep. Mineta).

[45] Section 43 left numerous other questions unanswered. *See generally Effects of Airline Deregulation; and Legislation to Ad-*

Congress' concerns about the EPP were heightened by its decision to authorize DOL (as opposed to another agency) to resolve these open issues and implement the program. The initial House proposal would have delegated employee protection authority to the Department of Transportation which, together with the Civil Aeronautics Board, was generally responsible for implementing the Act. *See* H.R. 8813, 95th Cong., 1st Sess. (1977). Labor representatives, however, insisted that DOL, which was not otherwise to be involved in airline deregulation, administer the program. *See, e.g., House Hearings* at 1569-70 (statement of William G. Mahoney, counsel for four labor unions); *id.* at 1588 (statement of John J. O'Donnell, President, ALPA). The principal architects of the Deregulation Act—the Senate Committee on Commerce, Science and Transportation and the House Committee on Public Works and Transportation—had little experience with DOL and lacked general jurisdiction over its programs, authorizations, appointments, and appropriations. The committees recognized that the Secretary of Transportation and the Chairman of the CAB were strong advocates of deregulation, *see* 124 Cong. Rec. S18,798 (daily ed. Oct. 14, 1978) (statement of Sen. Pearson), but they could not presume that DOL would be knowledgeable or even sympathetic to the objectives of the Deregulation Act.[46] Thus, when the Sen-

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vance the Date for Sunset of the Civil Aeronautics Board: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 97th Cong., 1st Sess. 735 (1981) ("*Sunset Hearings*") (statement of Gary Green, Director of Legal Department, ALPA) (Section 43 was a "leaky lifeboat" that contained "a lot of reservations in it, a lot of hitches, a lot of administrative qualifications, a lot of problems").

[46] Rep. Anderson, discussing H.R. 8813, emphasized the crucial role that the House had originally envisioned giving the Secretary of Transportation in developing an EPP from that bill's broad delegation of authority:

> [W]e put this in there kind of directing the Secretary of Transportation, Brock Adams . . . and we instructed him to study

ate bill transferred control over the EPP to DOL, the legislative veto was added as a check.

2. *The Conference Committee Compromise Strengthened The Significance Of The Veto.*

The Conference Committee's actions are strong evidence that Congress considered the veto provision an "integral" part of Section 43. 594 F. Supp. at 95 (34a). In the House and Senate bills, the Conference Committee faced two entirely different concepts of labor protection. The final House bill adopted the more traditional approach used in previous legislation concerning transportation industries:

> No authority granted by this Act . . . shall be exercised by any carrier unless prior to each such exercise, the Secretary of Labor has certified to the Civil Aeronautics Board that the interests of the employees who may be affected thereby have been adequately protected by fair and equitable arrangements providing levels of protection no less beneficial to and protective of such interests than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act . . . .[47]

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this area so that there can be protections if there is going to be any problem; and we did leave it very broad, very loose. We started out with more rigid, tighter provisions [but] we know we are dealing with Brock Adams.

House Hearings at 1022 (1977).

[47] Section 5(2)(f) of the Interstate Commerce Act directs the Interstate Commerce Commission to ensure that rail carriers provide protective arrangements for employees who are terminated as a result of individual railroad mergers or consolidations. 49 U.S.C. § 11347 (1982). Section 405 of the Rail Passenger Service Act requires rail carriers to protect employees who are adversely affected by the discontinuance of an intercity passenger route. 45 U.S.C. § 565 (1982).

H.R. 12611, 95th Cong., 2d Sess. § 32 (1978).[48] *See also* H.R. 8813, 95th Cong., 1st Sess. § 27 (1977) (predecessor bill containing similar language).

Meanwhile, the Senate bill created an entirely new concept of employee protection, providing that if a carrier suffered a "qualifying dislocation"—*i.e.*, bankruptcy or a 15% work force reduction occurring as a result of deregulation—its "protected employees" who were furloughed or terminated would be entitled to certain government compensation and the "first right of hire" by other carriers as determined by the Secretary of Labor. S. 2493, 95th Cong., 2d Sess. § 22 (1978). Section 22(f) of the Senate bill authorized DOL to issue regulations creating a formula for the assistance payments and implementing the duty-to-hire program, and provided that such regulations would be subject to a one-house legislative veto.[49] *See* Senate Report at 202-03; *id.* at 116.

The Conference Committee adopted the Senate approach with two important substantive modifications.

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[48] The House bill also provided that the employer would be reimbursed by the government for the cost of any protective arrangements provided to its employees. H.R. 12611, § 32.

[49] The court of appeals suggested that the veto may have been intended solely as a check on the government compensation part of Section 43. *See* 766 F.2d at 1562 (22a-23a). The overwhelming evidence shows, however, that Congress intended the compensation and duty-to-hire provisions to operate in tandem as a single program subject to extensive congressional oversight. *See, e.g.*, S. 2493, 95th Cong., 2d Sess. § 22(a), (b), (d) (1978) (compensation and duty-to-hire both triggered by finding of "qualifying dislocation"); Senate Report at 116 (emphasizing that the "interaction" of the duty-to-hire and compensation provisions would hold down the overall cost of the program); 124 Cong. Rec. S5876, S5885 (daily ed. Apr. 19, 1978) (proposed amendment that would delete compensation provision defeated). In fact, one proposed EPP included a veto provision applicable exclusively to the regulations implementing the duty-to-hire part of the program. *See* Senate Report at 208-09 (Additional Views of Sen. Zorinsky).

H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978) ("Conference Report"). First, the threshold for a "qualifying dislocation" was cut in half from 15% to 7½%. *Id.* Second, the "qualifying dislocation" requirement as a prerequisite for the right of first hire was eliminated, thus leaving unclear Congress' intent as to the circumstances under which employees adversely affected by the Deregulation Act would be eligible for the mandatory hiring preference. *Id.*[50]

The effect of the Conference Committee's compromise was thus to provide less guidance to DOL regarding the duty-to-hire authority. But the Conference simultaneously provided for increased congressional scrutiny of DOL's regulations. The Senate bill had provided for only a sixty-day legislative veto period before both houses of Congress. *See* S. 2493, 95th Cong., 2d Sess. § 22 (1978). The Conference expanded this review by adding the thirty-day committee submission requirement and the six-month deadline which, as discussed previously, combined with the one-house veto to guarantee that the members of Congress who had charted the path of airline deregulation could return to the issues they had left unresolved in the conference sessions.

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[50] *See Sunset Hearings* at 94 (statement of Rep. Levitas) ("[T]here is, as I am sure you are well aware, a great deal of dispute even within the Congress today as to what [the duty-to-hire] section means. . . ."). The district court on remand in this case has ruled that DOL did not unreasonably interpret Section 43 as extending the duty-to-hire right even to employees terminated for reasons completely unrelated to deregulation. *Alaska Airlines, Inc. v. Brock*, No. 84-0485, slip op. at 4-10 (D.D.C. Jan. 22, 1986). Yet Congress consistently stated that the hiring preference was available only to employees who were adversely affected by the legislation. *See, e.g.*, Senate Report at 113; H.R. Rep. No. 1211, 95th Cong., 2d Sess. 22 (1978). *See also Sunset Hearings* at 94 (statement by Rep. Levitas) (the duty to hire was intended to apply "only in the case of a layoff resulting from deregulation"). This issue is now on appeal to the D.C. Circuit.

While the Conference Committee strengthened congressional oversight of the Section 43 delegation to DOL, it simultaneously deleted its entire veto capability concerning the "automatic entry program," described as one of the most "controversial" provisions in the entire Act. *See* 124 Cong. Rec. S5852 (daily ed. Apr. 19, 1978) (statement of Sen. Pearson). The Senate bill gave the CAB certain "emergency" powers over that program, subject to a sixty legislative day one-house veto provision.[51] S. 2493, 95th Cong., 2d Sess. § 5 (1978) (proposed amendment to § 401(k)(11) of the FAAct).[52] The legislative veto provision concerning this delegation was removed in Conference, *see* 49 U.S.C. app. § 1371(d)(7)(D) (1982), leaving Section 43 subject to the only legislative veto in the entire Act. Thus, Congress made sparing and discriminating use of the veto in the Deregulation Act.

The court of appeals noted the sparse discussion of the veto provision after the Conference Report. *See* 766 F.2d at 1562-63 (23a-24a). Although the Section 43 labor protection provision was "very controversial" in Conference, 124 Cong. Rec. H13,446 (daily ed. Oct. 14, 1978) (statement of Rep. Harsha), the veto provision was not, and this silence is therefore understandable. Since the

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[51] The program gave airlines limited freedom to add and subtract routes without CAB approval, and the Senate bill authorized the CAB to modify the program under certain circumstances.

[52] The Senate Report suggests that the legislative veto provision in the automatic entry program was specifically inserted in S. 2493 out of a concern that the CAB might exercise its authority to frustrate the deregulatory purpose of the program:

> Again, *recognizing the extraordinary nature of this Board power and the firm commitment of the Committee to institute an automatic entry program,* any proposed Board modification must be submitted to the Congress prior to its proposed effective date and will not become effective if either House adopts a resolution disapproving such a regulation.

Senate Report at 67 (emphasis added).

House EPP approach was long established in other regulated transportation industries, *see supra* at 33-34, 39, the House evidently did not believe that a veto was needed for this well-established type of EPP. By contrast, the duty-to-hire and compensation schemes incorporated in the Senate bill created unprecedented, wide-ranging obligations, constituting a more controversial intrusion into the labor market. The only non-controversial element of the Senate approach was the veto provision, which was included in the Committee bill and every floor amendment. *See* 124 Cong. Rec. S5876 (daily ed. Apr. 19, 1978) (amendment by Sen. Zorinsky); *id.* at S5882 (amendment by Sen. Danforth). There was no disagreement in either the Senate or the House that the legislative veto was essential to the Senate approach to labor protection, which ultimately was adopted.

In persuading a skeptical House to acquiesce in the Senate's approach to labor protection,[53] Rep. Levitas, one of the principal architects of the Deregulation Act, emphasized the importance of the legislative veto, stressing that "this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that

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[53] The court of appeals failed to perceive the critical difference between the House and Senate bills. While some members of Congress did consider the House bill "stronger" than the Senate EPP, *see* 766 F.2d at 1565 (28a), because it provided assistance payments to every employee who could prove he was adversely affected by a specific action authorized by the Deregulation Act (*e.g.*, a route termination or merger) without requiring a 15% reduction in his employer's total work force, the veto was included in the Senate bill for other reasons. With its industry-wide duty-to-hire program that was not tied to specific actions of employers and its open-ended government assistance plan that provided no guidance to DOL on the levels of payment, the Senate bill presented an employee assistance package unprecedented in design and scope. *See supra* at 33-34. The veto therefore was necessary because Section 43 was unique and untested, not because it was stronger or weaker than the EPP proposed by the House.

the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law." [54] 124 Cong. Rec. H13,448 (daily ed. Oct. 14, 1978). Given that Section 43 was but one small part of a major piece of legislation, and that the House and Senate agreed that the veto was an absolutely necessary adjunct to the Senate bill's delegation of authority to DOL, it is hardly surprising that the veto was not the subject of lengthy debate.

By strengthening the Section 43 veto in Conference, and at the same time removing a veto provision from a section that was at least as controversial as Section 43, Congress unmistakably demonstrated its serious reservations about the regulatory authority delegated to DOL. While the Conference compromise admittedly does not prove that Congress would have rejected all labor protection provisions had it not been able to veto DOL's regulations, *see* 766 F.2d at 1564 (26a), it is strong evidence that absent the veto provision, Congress would not have adopted the unfamiliar Senate version in the form it did, granting DOL broad authority to create a new type of EPP with completely unknown effects.

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[54] The court of appeals sought to discount Rep. Levitas' comments because he was a "vigorous advocate" of the legislative veto. 766 F.2d at 1563 (23a). But Rep. Levitas was hardly a single-issue onlooker; he introduced several bills on airline deregulation, sponsored the final House bill, actively participated in the House Aviation Subcommittee's review and report on the Deregulation Act, and was a House member on the Act's Conference Committee. *See* Conference Report at 52. In short, for purposes of any legislative history analysis, he was a key player. *See Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("a statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute"). Moreover, if anything, the importance he generally placed on legislative veto provisions should lend additional weight to his comments on the Deregulation Act. *Cf. Daniel v. Paul*, 395 U.S. 298, 306-07 (1969) (relying on floor comments of Sen. Humphrey as a vigorous advocate of racial equality to interpret provisions of the Civil Rights Act of 1964).

CONCLUSION

Congress may have been unsure about the need for an EPP and may not have addressed the details of its implementation, but one thing was certain: Congress emphatically wished to reserve for itself ultimate authority over the manner in which DOL implemented the program. Had Congress known that it would be unable to control the EPP's destiny through the veto power, it would have been compelled to confront the questions it deliberately left unanswered, rather than delegate that responsibility. The result, in all probability, would have been a different type of employee protection program (*e.g.*, the traditional form adopted by the House), a program providing additional guidance to DOL on many issues (*e.g.*, the extent of the hiring duty, the levels of compensation and the reconciliation of conflicting safety and civil rights obligations), or a program administered by an agency (*e.g.*, DOT) more in step with the Act's deregulatory purpose. Under the *Champlin Refining* standard, the invalid legislative veto provision in Section 43 of the Deregulation Act is thus inseverable, and the entire section should be stricken.

For all of the foregoing reasons, petitioners respectfully submit that the decision of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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In the Supreme Court of the United States

OCTOBER TERM, 1986

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

51pp

QUESTION PRESENTED

Whether the legislative veto provision in subsection (f)(3) of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1552(f)(3), is severable from the remainder of Section 43, which imposes on air carriers a duty to hire airline employees who have been displaced from their jobs following deregulation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement:	
A. The Airline Deregulation Act	2
B. The employee protection program	4
C. The proceedings below	7
Summary of argument	12
Argument:	
I. The court of appeals correctly decided that the legislative veto provision of Section 43(f) should be severed from the duty-to-hire provisions of Section 43(d)	16
A. The court of appeals applied the proper rule of severability	16
B. The structure, language, and legislative history of the statute show plainly that Congress would not wish to abandon the remainder of Section 43	21
1. The structure and language of the statute	21
2. The legislative history of the statute	27
a. Initiation of the bill in the Senate	28
b. The Senate debate on the bill	32
c. The House Bill	34
d. The House debates	35
e. The bill reported by the conference	36
Conclusion	42

TABLE OF AUTHORITIES

Cases: Page

Aaron v. *SEC*, 446 U.S. 680 21
Alaska Airlines, Inc. v. *Brock*, 632 F. Supp. 178 11
Bowsher v. *Synar*, No. 85-1377 (July 7, 1986) 26
Buckley v. *Valeo*, 424 U.S. 1 ..... 12, 16, 18
Carter v. *Carter Coal Co.*, 298 U.S. 238 19
Champlin Refining Co. v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 ..... 9, 12, 16, 17, 18
Consumer Energy Council v. *FERC*, 673 F.2d 425, aff'd *sub nom. Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1216 ..... 32, 42
Consumer Product Safety Comm'n. v. *GTE Sylvania, Inc.*, 447 U.S. 102 21
EEOC v. *Allstate Insurance Co.*, 467 U.S. 1232 15
El Paso & N.E. Ry. v. *Gutierrez*, 215 U.S. 87 ..... 17, 19
Greyhound Corp. v. *Mt. Hood Stages, Inc.*, 437 U.S. 322 21
Gulf Oil Corp. v. *Dyke*, 734 F.2d 797, cert. denied, No. 84-20 (Oct. 1, 1984) 10
Heckler v. *Edwards*, 465 U.S. 870 15
INS v. *Chadha*, 462 U.S. 919 ..... *passim*
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 ..... 12, 18
People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N.Y. 48, 129 N.E. 202 43
Regan v. *Time, Inc.*, 468 U.S. 641 ..... 12, 17, 19, 23
Tilton v. *Richardson*, 403 U.S. 672 ..... 10, 13, 18
United States v. *Jackson*, 390 U.S. 570 ..... 12, 18, 19, 23

Statutes and regulation:

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* 3
49 U.S.C. App. 1371(c) 3
49 U.S.C. App. 1371(d) 3
49 U.S.C. App. 1371(d)(7) 4
49 U.S.C. App. 1373 4
49 U.S.C. App. 1482(d) 3
49 U.S.C. App. 1551 4
49 U.S.C. App. 1551(a)(1)(A) 3
49 U.S.C. App. 1551(a)(2) 4
49 U.S.C. App. 1551(a)(3) 3

Statutes and regulation—Continued: Page

49 U.S.C. App. 1552 (§ 43) ..... *passim*
49 U.S.C. App. 1552(a)-(c) (§ 43(a)-(c)) 5, 21
49 U.S.C. App. 1552(a)(1) (§ 43(a)(1)) 5
49 U.S.C. App. 1552(b)(1) (§ 43(b)(1)) 5, 21, 22
49 U.S.C. App. 1552(d) (§ 43(d)) 5, 13, 22
49 U.S.C. App. 1552(d)(1) (§ 43(d)(1)) 5, 6, 22, 23
49 U.S.C. App. 1552(d)(2) (§ 43(d)(2)) 6, 23
49 U.S.C. App. 1552(d)(3) (§ 43(d)(3)) 6, 23
49 U.S.C. App. 1552(e) (§ 43(e)) 5, 21
49 U.S.C. App. 1552(f) (§ 43(f)) 24
49 U.S.C. App. 1552(f)(1) (§ 43(f)(1)) 6
49 U.S.C. App. 1552(f)(2) (§ 43(f)(2)) 6, 14, 24, 25
49 U.S.C. App. 1552(f)(3) (§ 43(f)(3)) 6, 7, 25
49 U.S.C. App. 1552(g) (§ 43(g)) 21
49 U.S.C. App. 1552(h) (§ 43(h)) 5, 21
49 U.S.C. App. 1552(h)(1) (§ 43(h)(1)) 5, 22
28 U.S.C. 1252 ..... 9, 15
28 U.S.C. 1291 15
Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* 2
Rail Passenger Service Act, 45 U.S.C. 565(b) 39
Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 *et seq.* 39
29 C.F.R. 220.21(a)(1) 11, 12

Miscellaneous:

124 Cong. Rec. (1978)
p. 10647 32
p. 10649 32
pp. 10674-10675 33
pp. 10674-10676 33
p. 10677 33
pp. 10677-10678 33
p. 10679 33
p. 10682 33
p. 10683 33
p. 10695 34
p. 10698 34
p. 19427 38

Miscellaneous—Continued: Page

p. 29526 35
pp. 29529-29530 35-36
p. 30671 36
p. 30708 36
p. 37416 36
p. 37421 36
p. 38521 36
p. 38522 ..... 37, 41, 42
p. 38523 ..... 27, 36, 41
p. 38524 37
pp. 38524-38525 ..... 27, 36, 41

130 Cong. Rec.:
p. H2520 (daily ed. Apr. 10, 1984) 38
p. H10516 (daily ed. Oct. 1, 1984) 38

Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231, and Related Bills, Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 38

44 Fed. Reg. 19146 (1979) 7

47 Fed. Reg. 41304 (1982) 7

48 Fed. Reg. (1983):
p. 52854 7
p. 52863 11

H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. (1978) 3

H.R. Rep. 95-1211, 95th Cong., 2d Sess. (1978) 4, 34, 35

House Comm. on Public Works, 96th Cong., 1st Sess., *Legislative History of the Airline Deregulation Act of 1978* (Comm. Print 96-5, 1979) ..... *passim*

Legislative Veto Proposals: Hearings on S. 890 and S. 864, Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 37-38

Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 Hofstra L. Rev. 593 (1984) 38

S. Rep. 95-631, 95th Cong., 2d Sess. (1978) ..... *passim*

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BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 766 F.2d 1550, and the opinion of the district court (Pet. App. 30a-37a) is reported at 594 F. Supp. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1985, and a petition for rehearing was denied on September 11, 1985. The petition for a

writ of certiorari was filed on November 27, 1985; the Court granted the petition on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. The Airline Deregulation Act

Beginning in 1938 and for the next forty years, the federal government, acting through the Civil Aeronautics Board ("CAB"), extensively regulated the commercial airline industry. Pursuant to the Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*), the CAB "provided for comprehensive regulation of prices and entry in domestic air transportation" (S. Rep. 95-631, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as S. Rep. 95-631]; *Leg. Hist.* 168).[1] Over time, however, Congress came to believe that price and entry regulation was producing undesirable results. "Broad regulation of fares and rates ha[d] discouraged price competition at every turn [and] [n]ew entrants ha[d] been singularly unsuccessful in gaining new route authority" (S. Rep. 95-631, at 2; *Leg. Hist.* 168). "In short," the Congress concluded, "a careful analysis of the regulatory system indicated that it was imposing costs upon the industry and raising prices to consumers without producing any offsetting benefits" (*Leg. Hist.* v-vi) (Introduction by Harold T. (Bizz) Johnson, Chair-

[1] Much of the legislative background of the Deregulation Act has been compiled in a single volume entitled House Comm. on Public Works, 96th Cong., 1st Sess., *Legislative History of the Airline Deregulation Act of 1978* (Comm. Print 96-5, 1979) [hereinafter cited as *Leg. Hist.*].

man, Committee on Public Works and Transportation).

In 1978, Congress decided that "[t]he time ha[d] come for a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition" (S. Rep. 95-631, at 52; *Leg. Hist.* 218). Enacting the Airline Deregulation Act of 1978 (the Deregulation Act), Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, Congress took "historic" measures "to return the air transportation industry to [the] free enterprise economy" (S. Rep. 95-631, at 4; *Leg. Hist.* 170). It jettisoned the industry-wide fare structure previously enforced by the CAB and substantially altered the procedures by which airlines could enter new markets (49 U.S.C. App. 1371(c) and (d) and 1482(d)). It also abolished the licensing power of the CAB as of 1981, and, effective in 1984, eliminated the CAB altogether (49 U.S.C. App. 1551(a)(1)(A) and (a)(3)).

In making what it termed "a major change and fundamental redirection * * * [in the] regulation of * * * air transportation" (S. Rep. 95-631, at 52; *Leg. Hist.* 218), Congress felt "strongly that the movement to a more competitive airline system should be made without major disruptions to the industry or the traveling public" (S. Rep. 95-631, at 5; *Leg. Hist.* 171). For that reason, Congress made clear that the Deregulation Act was intended to effectuate a "gradual and phased transition to a deregulated system" (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 56 (1978); *Leg. Hist.* 898). During the first three years under the new act, for example, each previously certificated air carrier could enter only one new market without prior CAB approval (49 U.S.C.

App. 1371(d)(7)). And not until 1982 could carriers enter new markets and withdraw from unprofitable old ones, free from government regulation (49 U.S.C. App. 1551). Similarly, while Congress reduced the authority of the CAB over airline rates during the first three years of deregulation, it did not terminate that authority entirely until 1983 (49 U.S.C. App. 1373, 1551(a)(2)).

B. The Employee Protection Program

Just as it sought to minimize disruption to the industry and the traveling public, Congress in 1978 expressed its determination to "insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation * * * not [be] paid for by a minority—the airline employees and their families who have relied on the present system" (S. Rep. 95-631, at 114; *Leg. Hist.* 280). The Senate Committee recognized that airline employees had relied upon the system of regulation both in "their decision to enter the industry" and in their decision to remain (*ibid.*). Over time, the Senate reported, the regulatory structure had prevented the operation of "the normal free market" in employment; as a result, "[i]n order for Congress responsibly to change its policy now and require the industry to move toward a much more competitive market oriented environment, Congress should attempt to minimize the [employee] disclocations caused by the change" (*ibid.*). The House Committee expressed the same concern (see H.R. Rep. 95-1211, 95th Cong., 2d Sess. 22 (1978); *Leg. Hist.* 530).

Congress therefore provided a statutory Employee Protection Program ("EPP"), enacted as Section 43

of the Deregulation Act (49 U.S.C. App. 1352), to assist dislocated employees. The EPP as enacted had two parts. The first provided for monthly payments and relocation assistance to persons who had been employed by airlines for at least four years ("protected employees") and who lost their jobs or much of their income because of deregulation (Section 43(a)-(c), (e), and (h) of the Deregulation Act, 49 U.S.C. App. 1552(a)-(c), (e), and (h)). The Secretary of Labor was directed to promulgate "guidelines to be used by him in determining the amount of each monthly assistance payment to be made" (49 U.S.C. App. 1552(b)(1)). The financial assistance part of the EPP, however, was expressly made "subject to such amounts as are provided in appropriation Acts" (49 U.S.C. App. 1552(a)(1)); Congress never appropriated any funds, and the financial assistance program has not become operative and cannot become operative without future legislation. It is not involved in this case except as it bears on the intent of Congress in providing a legislative veto.

The second part of the EPP imposes on airlines certificated under the prior regulatory system a "duty to hire protected employees." Section 43(d), 49 U.S.C. App. 1552(d), provides that "[e]ach such air carrier hiring additional employees shall have a duty to hire [protected employees] before they hire any other person * * *" (§ 43(d)(1)). Protected employees are those who had been employed by a certificated carrier for at least four years as of the date that the Deregulation Act went into effect (49 U.S.C. App. 1552(d) and (h)(1). If any such employee is "furloughed or otherwise terminated" other than for cause within the ten years after October 24, 1978, a carrier covered by the section is obligated to hire him,

"in his occupational specialty," before it may hire any other job applicant to fill the position (except that the hiring carrier may first rehire any of its own previously furloughed employees) (49 U.S.C. App. 1552(d)(1)).

The duty to hire is imposed directly on the affected carriers by Section 43(d)(1). A separate provision directs the Secretary of Labor to "establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers" and to "make every effort to assist an eligible protected employee in finding other employment" (§ 43(d)(2)). Section 43(d)(2) further provides that "[i]n order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection".[2]

A separate subsection of Section 43 provides that the Secretary of Labor "may issue, amend, and repeal such rules and regulations as may be necessary for the administration" of the EPP (49 U.S.C. App. 1552(f)(1)). It states that the "rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section [relating to monthly assistance payments] and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978" (49 U.S.C. App. 1552(f)(2)). It also states that the Secretary may not issue any final rule until 30 legislative days after it has been submitted to the two transportation committees of Congress (49 U.S.C. App. 1552(f)(3)).

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[2] The Secretary is also directed to encourage negotiations between air carriers and eligible protected employees "with respect to rehiring practices and seniority" (49 U.S.C. App. 1552(d)(3)).

Finally, it contains a legislative veto provision, declaring that any such final rule shall be submitted to Congress and shall become effective after 60 legislative days, unless during that 60-day period either House of Congress adopts a resolution disapproving the rule. *Ibid.*[3]

The Deregulation Act took effect on October 24, 1978. In March 1979, the Secretary published proposed regulations covering both the financial assistance and duty-to-hire portions of the EPP (44 Fed. Reg. 19146). Thereafter, in September 1982, the Secretary issued revised proposed regulations relating only to the duty to hire (47 Fed. Reg. 41304). Following receipt of public comments, the Secretary promulgated final regulations in November 1983 (48 Fed. Reg. 52854), and simultaneously submitted them to Congress. But for this litigation the regulations would have become effective on May 17, 1984.

C. The Proceedings Below

Petitioners are 14 airlines subject to the duty-to-hire provisions of the Deregulation Act. They brought this action in the United States District Court for the District of Columbia against the respondent Secretary; thereafter, several airline employee unions intervened as defendants. Among a variety of constitutional and statutory claims, petitioners contended that the legislative veto provision in Section 43 is unconstitutional under this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983); that the veto provision is not severable from the balance

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[3] If both Houses adopted an approval resolution during the 60-day period, the rule would become effective immediately (49 U.S.C. App. 1552(f)(3)).

of Section 43; and that the entire EPP must therefore be invalidated.

The Secretary agreed that under *Chadha* the legislative veto provision is unconstitutional. The Secretary argued, however, that the veto clause is severable from the remainder of Section 43, and that the Secretary's regulations relating to the duty-to-hire provisions of the EPP should therefore be sustained. The Secretary also defended his regulations against the other legal challenges raised by petitioners.

In May 1984, just before the Secretary's regulations were to have become effective, the district court granted summary judgment to petitioners (Pet. App. 30a-37a). The court struck down the entire EPP, holding that the legislative veto clause could not be severed from the remainder of Section 43 (Pet. App. 34a-37a). The court did not reach any of the other issues raised by the petitioners.

The district court first considered the test for severability of unconstitutional provisions. The court stated that "[t]he question is not * * * whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the remainder of the statute merely because it might be an approximation of what Congress would have enacted" (Pet. App. 33a n.3 (emphasis in original)). Examining the text and history of the Deregulation Act, the court concluded that "Congress considered the legislative veto provision to be integral to the EPP and that Congress would not have enacted § 43 in its present form without such a provision" (*id.* at 34a). The court found "most significant" the fact that Section 43 was the only portion of the De-

regulation Act to contain a legislative veto (Pet. App. 34a). The court also found in the legislative history of Section 43 evidence that Congress wanted to "subject to a legislative veto" what the district judge felt was a "grant of * * * broad authority to the Secretary" (Pet. App. 35a). The court discounted the fact that there was "relatively little discussion of the veto provision in the legislative history of the Act" (*ibid.*). Applying its view of the governing legal standard, the district court was unable to find that Congress "would * * * have enacted the remainder of § 43 in its present form without [the legislative veto]" (*id.* at 36a). It therefore invalidated the entire EPP (*id.* at 37a).

The Court of Appeals for the District of Columbia Circuit reversed, holding that the legislative veto provision was severable from the rest of Section 43.[4] The court of appeals first reviewed the severability principles articulated by this Court in *Chadha* and other cases. Following *Chadha* and earlier cases dating back to *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 (1932), the court held that the legislative veto provision must be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" (Pet. App. 16a (quoting *Chadha*, 462 U.S. at 931-

[4] Before reaching the merits of petitioners' claims, the court first held that appellate jurisdiction properly lay in the court of appeals, notwithstanding the provisions of 28 U.S.C. 1252 (Pet. App. 6a-9a). The court then determined that the severability issue was ripe, despite the fact that Congress had never exercised the legislative veto contained in Section 43 (Pet. App. 9a-10a). The court also concluded that the district court had correctly decided that this Court's decision in *Chadha* applies retroactively to earlier enacted veto provisions (*id.* at 11a-15a).

932)). The court of appeals rejected petitioners' construction of that language, according to which the entire statute must be invalidated whenever "Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision" (*id.* at 18a). That approach, the court of appeals determined, would violate " '[t]he cardinal principle of statutory construction [which] is to save and not to destroy' " (*id.* at 18a n.9 (quoting *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971)). Limiting its consideration to the two available choices, the court of appeals held that " 'the question is * * * whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all' " (Pet. App. 18a, quoting *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (Temp. Emer. Ct. App.), cert. denied, No. 84-20 (Oct. 1, 1984)).[5] In making that determination in this case, the court of appeals further noted, petitioners must overcome a presumption of severability because the duty-to-hire provision "is fully operative as a law" without the legislative veto provision (Pet. App. 16a-17a (quoting *Chadha*, 462 U.S. at 934)).

The D.C. Circuit reviewed the text and legislative history of the Deregulation Act in light of these standards (Pet. App. 20a-24a, 27a-28a). In the legislative history the court found that Congress had expressed "a strong, humanitarian desire to provide for airline employee protection" and, by contrast, had evinced "relatively little concern about the veto pro-

[5] The court of appeals did not state, as petitioners imply (Br. 7), that the test is whether Congress would have preferred *any* protection statute to none at all. It simply compared the statute it had with the only available alternative—striking it down.

vision" (*id.* at 19a). The court rejected petitioners' argument that the structure of the oversight provisions "evidenc[ed] a Congressional intent of inseverability" (*id.* at 24a-27a). After examining the record in considerable detail the court concluded that "[a]mple evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." *Id.* at 28a.[6] The court of appeals therefore upheld the balance of Section 43 and remanded the case to the district court to consider petitioners' remaining challenges (Pet. App. 28a).[7]

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[6] Judge Ginsburg concurred in the judgment. Like the majority, she concluded that "[d]eletion of the veto preserves Section 43 and thereby gives effect to the dominant intent of Congress," while a declaration of inseverability "would be far more destructive of the legislature's will" (Pet. App. 29a).

[7] On remand, the district court sustained all but one of the Secretary's regulations against petitioners' contention that they were inconsistent with the Deregulation Act (*Alaska Airlines, Inc.* v. *Brock*, 632 F. Supp. 178 (D.D.C. 1986)). The sole exception was Section 220.21(a)(1) (29 C.F.R.) of the regulations (Pet. App. 52a; 48 Fed. Reg. 52863 (1983)), which deals with the initial hiring age of designated employees. The district court remanded to the Secretary that part of the rule that affected flight officers and pilots. After the district court and court of appeals declined to stay the effective date of the remainder of the regulations, the Chief Justice, by order dated January 27, 1986, denied petitioners' application for a stay pending the Court's disposition of petitioners' certiorari petition. No. A-571. The Secretary's regulations accordingly went into effect on January 27, 1986. After this Court granted certiorari approximately one month later, the D.C. Circuit recalled its mandate, as it automatically does in such instances. On May 9, 1986, pursuant to the Secretary's motion, the court of appeals reissued its mandate, thereby allowing the Secre-

SUMMARY OF ARGUMENT

I. The court of appeals faithfully applied the rule prescribed by this Court for determining whether an unconstitutional provision is severable: the unconstitutional provision should be severed and the balance of the statute sustained " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (*Chadha*, 462 U.S. at 931-932, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). Applied to this case, as the court of appeals held (Pet. App. 18a-19a), this rule dictates sustaining the duty-to-hire provisions "unless it is evident" that the enacting Congress would have preferred to abandon the duty-to-hire provisions if it had known that it could not have the legislative veto provision.

The phrase "unless it is evident" reflects a strong presumption in favor of severability. The Court has held that a further presumption arises when what remains is " 'fully operative as a law' " (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234; see also *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *United States* v. *Jackson*, 390 U.S. 570, 585-591 (1968)). Courts have no authority to invalidate federal statutes except the command of the Constitution, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803), or the expressed or "evident" intent of Congress that an otherwise valid

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tary's program to go back into effect. On May 20, 1986, the Chief Justice denied petitioners' request that the mandate be recalled and stayed. The regulations are now in operation, with the exception of Section 220.21(a)(1), insofar as it relates to flight officers and pilots.

provision is to fall with an unconstitutional provision. Absent such instructions, the duty of the court is " 'to save and not to destroy' " (*Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971)), permitting Congress, and not the courts, to reconsider otherwise valid provisions after a portion of the statute has been found unconstitutional.

Petitioners' contention that the court of appeals "formulated * * * a completely new standard" that "violates the * * * separation of powers" (Br. 9-10), is groundless. The court of appeals, expressly following this Court's instructions, made a meticulous examination of the only issue a court *does* have the power to decide: whether it is evident (from the text, structure, or legislative history) that Congress would not have wanted the courts to enforce the constitutional remainder of a statute, after the unconstitutional part was stricken. It is petitioners, who insist that courts speculate about whether Congress would have preferred some third possibility—perhaps a statute "with different form, content or language" (Br. 15)—who would have the courts intrude on the legislative domain and strike down otherwise valid legislation without instructions from Congress to do so.

II. As the court of appeals concluded, the structure and language of the EPP show plainly that Congress would have wanted the duty-to-hire provisions in Section 43(d) to survive. The statute itself imposes the duty to hire directly on the air carriers; the Secretary is given only the routine functions of gathering and providing information and otherwise assisting. The statutory requirements imposed on the air carriers do not depend on any regulatory action by the Secretary and would not have been subject to any veto. There is not the slightest reason to suppose, as petitioners do, that Congress would prefer

to abandon the detailed structure that *it* created simply because it lost the power to veto regulations of the Secretary that, in respect of this part of the EPP, were entirely routine.

The legislative history also confirms the court of appeals' conclusion "that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan" (Pet. App. 28a). The EPP was described, again and again in the legislative debates, as an important "insurance" feature of deregulation; the veto provision, on the other hand, appears to have been a reflexive addition to the bill, added almost without comment.

In particular, there is not the slightest suggestion that any member of Congress anticipated the possibility of vetoing any regulation relating to the duty-to-hire provisions. The only mention of the legislative veto in the committee reports relates it to the financial assistance program (which is now inoperative), not the duty-to-hire provisions that are before the Court. (The statute itself, in fact, suggests in Subsection (f)(2) that the desire for congressional oversight related principally to the financial assistance program.) Moreover, the only comment on the veto clause in the debates in either House came from one House member, long a champion of the legislative veto, who noted his routine approval of the inclusion of such a clause in the Conference Bill—without suggesting any particular concern about duty-to-hire regulations or any others; in fact, the House Bill, which he had actively supported, did not contain a veto clause. A fair reading of the legislative record thus richly confirms what the court of appeals concluded: there is no reason to believe that, if Congress had

anticipated the demise of the legislative veto, it would have wanted the courts to invalidate the duty-to-hire provisions of the EPP.[8]

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[8] Petitioners contend, as they did below, that the court of appeals lacked jurisdiction because the district court's decision held "an Act of Congress unconstitutional" and therefore, pursuant to 28 U.S.C. 1252, could only be appealed directly to this Court. As the court of appeals concluded in rejecting this argument (Pet. App. 6a-9a), this Court's jurisdictional ruling in *EEOC* v. *Allstate Insurance Co.*, 467 U.S. 1232 (1984), resolves this question against petitioners. There, the EEOC took a protective appeal to this Court pursuant to 28 U.S.C. 1252 from a district court decision holding the legislative veto provision in the Reorganization Act of 1977 inseverable from the remainder of the enactment. At the same time, however, the EEOC contended that the severability holding of the district court presented simply a question of legislative intent—not one of the constitutionality of the remaining provisions. As such, the EEOC maintained, an appeal was properly brought to a court of appeals pursuant to 28 U.S.C. 1291. See *Heckler* v. *Edwards*, 465 U.S. 870 (1984). This Court dismissed the appeal in *Allstate*, making it clear that an appeal under these circumstances must be taken to the court of appeals.

Petitioners' effort to distinguish *Allstate* (Br. 13 n.13) is unavailing. They contend that in *Allstate* the appellants challenged only the *remedy* ordered by the district judge, after he had found the veto provision unconstitutional. By contrast, petitioners maintain, here the United States has challenged the district court's finding of inseverability. But this is just a semantic quibble: the "remedy" challenged in *Allstate* was the same as that which the Secretary appealed from here—the declaration that a legislative veto provision is, by virtue of legislative intent, inseverable from the balance of the statute. Under this Court's unanimous holding in *Heckler* v. *Edwards*, 465 U.S. at 885, an appeal only from that judgment—which does not challenge the underlying decision that the veto is unconstitutional—does not vest jurisdiction in this Court under 28 U.S.C. 1252.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE LEGISLATIVE VETO PROVISION OF SECTION 43(f) SHOULD BE SEVERED FROM THE DUTY-TO-HIRE PROVISIONS OF SECTION 43(d)

A. The Court of Appeals Applied The Proper Rule Of Severability

Both courts below, and all parties in this Court, have agreed that this case is governed by the severability rule repeatedly stated by this Court (*Chadha*, 462 U.S. at 931-932, quoting *Buckley*, 424 U.S. at 108, and *Champlin*, 286 U.S. at 234):

> [T]he valid portions of a statute are to be severed " 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' "

Petitioners have misinterpreted this *Champlin* rule in two respects.

First, petitioners make the remarkable assertion that under the *Champlin* rule an entire statute must be invalidated whenever it appears that Congress—had it known that one portion would be declared invalid—would have modified the remainder in any respect (Br. 15, 18).[9] To make that formulation seem more plausible, petitioners repeatedly (and incorrectly) attribute to the Secretary, and to the court of appeals, a formulation that would sustain the re-

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[9] Even if petitioners' formulation were correct, it would not change the result in this case: as we show below, there is no evidence that Congress would have modified the duty-to-hire provisions in any respect if it had known that it could not have a legislative veto.

mainder of a statute whenever it appears that Congress would have enacted *any* statute with the same general purpose (*i.e.*, Br. 9-10).

Both of petitioners' formulations—the one that they endorse and the one that they erroneously ascribe to the court of appeals—are wrong. A court's proper task, when deciding severability, is to choose between the two *available* alternatives, saving the balance of what Congress in fact enacted, unless it is evident that Congress would not have wanted the remainder enforced in the absence of the unconstitutional provision. That is the plain meaning of the *Champlin* rule, and that is the only formulation that avoids intrusion upon Congress' prerogatives. Both of petitioners' formulations would lead to inappropriate, and inevitably fruitless, speculation about legislation neither adopted nor actually considered by Congress. And both would rest the fate of provisions Congress actually enacted on the hypothetical fate of imaginary alternative legislation.

Second, petitioners ignore the strong presumption, reflected in the *Champlin* rule, in favor of severance. The words "unless it is evident * * *" obviously imply such a presumpton. Explaining the reason for the presumption, the plurality in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), said, "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary" (*id.* at 652; accord *id.* at 661, 677 (Brennan, J., dissenting and concurring); cf. *El Paso & N.E. Ry.* v. *Gutierrez*, 215 U.S. 87, 96 (1909)). The Court has also repeatedly stated that where the valid remainder of a statute " 'is fully operative as a law,' " the invalid provision "is fur-

ther presumed severable" (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234).[10] These presumptions reflect the fact that courts have no authority to invalidate federal statutes except the command of the Constitution, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803), or the expressed or "evident" intent of Congress. The duty of the courts is to sustain constitutionally valid parts of a statute unless either there is a clear indication in the statute or its legislative history that Congress would have wanted them to fall, in the absence of the unconstitutional part, or the valid parts cannot operate without the unconstitutional part.

The decision of the court of appeals in this case was entirely faithful to the severability rule articulated by this Court. Following *Chadha*, the court of appeals held that the veto provisions should be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (Pet. App. 16a, quoting *Buckley*, 424 U.S. at 108). Noting, further, the presumption in favor of severability where, as here, the valid portion " 'is fully operative as a law' " (Pet. App. 16a, quoting *Chadha*, 462 U.S. at 934), the court of appeals held, consistent with this Court's decisions, that "[o]nly if we conclude that Congress would not have included [the balance of Section 43] absent the constitutionally flawed portion [are those] provision[s] to fall" (Pet. App. 18a). The court reviewed the language

[10] In *Chadha*, the Court also found a presumption based on the existence of a severability clause. It is clear that, while the presence of a severability clause certainly strengthens the case for severance, the absence of such a clause does not raise a presumption against severability. See *Tilton* v. *Richardson*, 403 U.S. at 684; *United States* v. *Jackson*, 390 U.S. at 585 n.27.

and structure of Section 43, together with its legislative history, and concluded that had Congress known that the veto would be found unconstitutional, it would *not* have preferred "no employee protection program over the program passed by Congress shorn of its veto provision" (Pet. App. 28a).

The court of appeals asked precisely the right question. The district court had only two choices when it found the legislative veto portion of the EPP invalid: save the duty-to-hire provisions or strike the duty-to-hire provisions. Since that choice depended on legislative intent (*Regan*, 468 U.S. at 653; *Jackson*, 390 U.S. at 585-591; *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936)), the relevant question, in this case, is just as the court of appeals put it: would Congress have preferred "no employee protection program over the program passed by Congress shorn of its veto provision" (Pet. App. 28a).

Petitioners contend that the court of appeals' approach "rais[es] serious separation-of-powers concerns" (Br. 19) and "improperly allows the judiciary to reformulate statutes to create laws which are not at all what Congress contemplated" (Br. 17). But this is simply not a case in which a court has changed the meaning of a statute in order to save its constitutionality. The court of appeals here sought "to save as much of the statute as [it] can" (Pet. App. 18a; see *Regan*, 468 U.S. at 652; *El Paso & N.E. Ry.*, 215 U.S. at 96), by sustaining otherwise valid provisions that operate independently and that Congress clearly considered important. It did so without in any way "reformulating" the duty-to-hire provisions or departing in any way from what Congress contemplated. And it left to Congress the task of revising the EPP, should it choose to, in light of the demise of the legislative veto.

Under petitioners' theory, on the other hand, if a court finds anything in the otherwise valid balance of a statute that it guesses Congress might have written differently were it not for the invalid provision, the court must strike the whole enactment—even if it is clear that Congress would have preferred to keep the balance of the statute rather than lose it. It could not be plainer that the court of appeals honored (as far as possible) what Congress wrote and intended, while petitioners' approach would force the courts into speculation about legislation Congress did not enact.

Finally, this case illustrates perfectly still another problem with petitioners' approach to severability: there is no stopping place. Petitioners apparently believe—and the district court, accepting petitioners' legal premise, expressly held (Pet. App. 37a n.5)—that the EPP was severable from the balance of the Deregulation Act. Thus, the district court concluded, the invalidation of the EPP did not require the entire deregulation statute to be struck down. The court so held because, in its view, "[n]othing in the statute or legislative history even remotely suggests that Congress would not have passed the Act without the EPP or that in the absence of an EPP it would have taken a different approach to deregulation" (*ibid.*). In fact, there is a good deal of evidence that at least some members of Congress would have taken a much dimmer view of the rest of the Deregulation Act had the draftsmen not included the EPP. See, *e.g.*, S. Rep. 95-631, at 221; *Leg. Hist.* 387 (Sen. Inouye); *id.* at 216; *Leg. Hist.* 382 (Sen. Danforth). Indeed, the evidence unmistakably shows that the EPP was more essential to the passage of the entire Deregulation Act than the legislative veto was to the passage of the EPP. See pages 28-39, *infra*. Under petitioners'

proposed standard it is hard to see why the balance of the Deregulation Act should not be invalidated along with the EPP. Certainly, petitioners do not say.

B. The Structure, Language, And Legislative History Of The Statute Show Plainly That Congress Would Not Wish To Abandon The Remainder Of Section 43

1. *The Structure And Language Of The Statute*

"[T]he starting point for interpreting a statute," this Court has noted, "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive" (*Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Accord *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Here, the language and structure of Section 43 leave no doubt that Congress would have wanted the duty to hire it imposed on petitioners to be sustained, notwithstanding the invalidity of the legislative veto.

Section 43 established two different kinds of protection for employees displaced from their jobs as a result of airline deregulation. The first program, embodied in Section 43(a)-(c), (e), (g), and (h), 49 U.S.C. App. 1552(a)-(c), (e), (g), and (h), was intended to provide "monthly assistance" and other financial support to eligible employees. Under this program, eligible employees were entitled to receive, "subject to such amounts as are provided in appropriation Acts," a "monthly assistance payment * * * in an amount computed by the Secretary" (§ 43(b)(1), 49 U.S.C. App. 1552(b)(1)). In discharging his considerable discretion under this provision, the Secretary of Labor, "after consultation with the Secretary of Transportation," was to "promulgate guide-

lines to be used by him in determining the amount of each monthly assistance payment to be made" (§ 43(b)(1), 49 U.S.C. App. 1552(b)(1)). This program, however, was never funded by Congress and, thus, never went into effect.

The other program provided by Section 43, embodied in Section 43(d), 49 U.S.C. App. 1552(d), imposed on air carriers a "duty to hire protected employees" who were "furloughed or otherwise terminated" by an air carrier during the 10-year period beginning with the effective date of the Deregulation Act. In contrast to the assistance provisions, Congress imposed this obligation, unconditionally, in the statute itself and spelled out the "duty to hire" in some detail. Paragraph 43(d)(1) gives "[e]ach person who is a protected employee of an air carrier"—defined by Congress in Section 43(h)(1), 49 U.S.C. App. 1552(h)(1)—"who is furloughed or otherwise terminated by * * * an air carrier (other than for cause)" a "first right of hire" for a specific period of time. This right of hire, Congress stated, extends only to the employee's "occupational specialty" but may be enjoyed "regardless of age." Each affected air carrier—defined by Congress in Subsection (d)(1)—"shall have a duty to hire" protected employees "before they [sic] hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person." Further, each employee rehired pursuant to this subsection "shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him."

Whereas the now inoperative assistance program could not have functioned without a substantial exercise of discretion by the Secretary (who was to fix the guidelines for benefits), the statute does not make

the airlines' duty to hire dependent on regulation at all.[11] The Secretary's role is an auxiliary one, and the scope of his assigned duties is routine; there is no reason whatever to think Congress might have wanted to veto his exercise of those functions. The Secretary is mentioned only in an entirely separate provision (§ 43(d)(2)), which directs him to "publish a comprehensive list of jobs available with air carriers", which list "shall include * * * information and detail * * * such as job descriptions and required skills." The same provision directs him to "make every effort to assist an eligible protected employee in finding other employment." To carry out these functions "the Secretary may require each * * * air carrier to file with the Secretary * * * reports, data, and other information." [12]

Congress did not make the airlines' duty to hire, which is set forth in Section 43(d)(1), conditional in any way on regulations and did not subject it to any legislative veto. That fact provides the clearest possible evidence that Congress would not have wanted the duty to hire invalidated merely because the legislative veto was invalidated. And the responsibilities that Congress *did* give the Secretary with respect to the duty to hire (in contrast to his responsibilities

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[11] The Court need not decide in this case whether, if the assistance provisions had not been rendered inoperative by Congress' failure to fund them, they would have been invalidated as inseverable from the legislative veto. The fate of the duty-to-hire provisions does not depend in any way on that question. See *Regan*, 468 U.S. at 653; *Jackson*, 390 U.S. at 585-591.

[12] A separate provision provides that, in addition to these duties, "the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority" (§ 43(d)(3)).

under the assistance program) were auxiliary activities in connection with a program whose basic obligations were defined and imposed on the carriers by Congress itself. There is no reason to believe that Congress contemplated the possibility of vetoing any of the Secretary's actions in connection with the duty-to-hire program.[13]

The language of Section 43(f), which contains the legislative veto, also confirms that to the extent that Congress wanted to oversee anything, it was the anticipated assistance regulations, not the Secretary's activities in connection with the duty to hire. Section 43(f)(2) provides that within six months the Secretary shall promulgate "[t]he rule containing the guidelines which is required to be promulgated pursuant to subsection (b) [establishing the "monthly assistance" program] and any other rules or regulations which the Secretary deems necessary to carry out this section." Congress' principal concern—the only set of regulations that it identified specifically in Subsection (f)—was the regulations under the

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[13] Petitioners' assertion that "Section 43 required *the Department of Labor* * * * to establish a novel, untested type of labor protection" (Br. 3) (emphasis added) is incorrect. It was Congress, not the Secretary, which imposed the duty to hire from which petitioners now seek to escape, and it is to Congress that they should address their objections. Petitioners' suggestion that because of purported "uncertainty about the need for labor protection * * * Congress did not fully develop the EPP" (Br. 4) is similarly mistaken. The EPP was, as petitioners acknowledge (Br. 3), an "insurance" program, and it was of course hoped that few employees would need to call on it; but Congress exhibited no uncertainty whatever about whether the duty-to-hire part of the insurance should go into effect. To the contrary, Congress unambiguously declared its intent to impose on air carriers a duty to hire displaced workers.

"monthly assistance" program. And it is not hard to see why: with respect to the financial assistance program, Congress delegated the hard, and expensive, choices to the Secretary, subject to appropriation by Congress.[14]

The case for severability of the legislative veto is strengthened by the fact that Subsection 43(f)(3) also provides for a so-called "report and wait" rule, under which the Secretary may not "issue any rule or regulation as a final rule or regulation * * * until 30 legislative days after it has been submitted" to the congressional transportation committees. As a result of this provision, the demise of the veto did not deprive Congress of all power to review the Secretary's regulations. Congress retains the authority to review proposed regulations and, if it wishes, to disapprove them through constitutionally permissible legislation.[15]

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[14] Petitioners find fault with the court of appeals' determination that the legislative veto was primarily directed at the payment regulations—not the duty to hire (Br. 40 n.49). They argue that Congress intended both parts of the EPP to "operate in tandem" (*ibid.*). Whatever that may mean (and, of course, it has not proven to be the case in practice), it does not contradict the considerable evidence that the *only* source of controversy in the EPP was the assistance provisions. Those provisions were, potentially, the costliest and, under the statutory framework, involved the greatest measure of delegated authority to the Secretary. Not surprisingly, the only part of the EPP to which the oversight provisions make specific reference is the portion giving the Secretary authority to promulgate guidelines for monthly payments (49 U.S.C. App. 1552(f)(2)).

[15] The Court made a similar point in *Chadha*, finding the legislative veto severable in part because a "report and wait" type of oversight remained available to Congress. The Court noted that, without the legislative veto, "Congress' oversight

Petitioners contend that Congress viewed the EPP as an "unprecedented" proposal, which was "fundamentally inconsistent with the overall deregulatory purpose manifest throughout the Act" (Br. 29, 33-34). They imply (*id.* at 32-33) that Congress inserted a veto provision "directly into subsection 43(f), the same provision granting the DOL delegation" (*id.* at 30), and combined the veto power with a "report and wait" requirement (*id.* at 32 & n.39), because Congress wanted a second look before the duty to hire was implemented. But, first, petitioners mischaracterize the record. Congress assuredly did not regard the duty to hire as a "novel, untested type of labor protection" (Br. 3); in fact, the Senate Report described the EPP as a program similar to ones that had been approved "in certain cases in the past" (S. Rep. 95-631, at 113; *Leg. Hist.* 279).[16] Moreover,

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of the exercise of * * * delegated authority is preserved since all such suspensions will continue to be reported to it" (462 U.S. at 935). "Without the one-House veto," the Court observed, the remaining statute "resembles the 'report and wait' provision approved by the Court" in prior case law (*id.* at 935 n.9). See also *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 19 (inclusion of fallback provision indicative of legislative intent with respect to consequences of invalidation of statutory provision).

[16] Only Senator Zorinsky described the EPP as "without precedent", but he limited his characterization to the monthly payment program (S. Rep. 95-631, at 208; *Leg. Hist.* 374) (additional views of Sen. Zorinsky). That program, we have noted, was never funded and never became operational. The Senator did, however, find ample precedent for the duty-to-hire program, which he thought "mesh[ed] perfectly with this expanding competitive environment" (S. Rep. 95-631, at 206; *Leg. Hist.* 372). The Senator, in fact, proposed amending the EPP in a way which would have retained the duty-to-hire provisions in their present form. *Id.* at 208-209; *Leg. Hist.* 374-375.

Congress did not regard the EPP as "fundamentally inconsistent" with the deregulation bill. As petitioners are constrained to admit (Br. 43 n.53), some members of the House even favored a protection program stronger than the final bill. See 124 Cong. Rec. 38523 (1978); *Leg. Hist.* 983 (statement of Rep. Harsha); 124 Cong. Rec. 38524-38525 (1978); *Leg. Hist.* 986 (statement of Rep. Mineta). All of the evidence affirms Congress' belief that the EPP was entirely consistent with the desire that "movement to a more competitive airline system * * * be made without major disruptions" (S. Rep. 95-631, at 5; *Leg. Hist.* 171), and without causing the benefits of the deregulation to be "paid for by a minority—the airline employees and their families" (*id.* at 114; *Leg. Hist.* 280). While Congress clearly retained the right to decline to fund the assistance program, there is not the slightest evidence to support petitioners' suggestion that Congress wanted the duty to hire to be less than an unconditional statutory obligation.[17]

2. *The Legislative History Of The Statute*

The court of appeals "emerge[d] from [its] trek through the legislative history of the Airline Deregu-

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[17] Petitioners point to the fact that out of the entire Deregulation Act only Section 43 contained a legislative veto (Br. 28-29) as demonstrating that Congress would not have wanted the duty-to-hire provisions to be sustained in the absence of the legislative veto. But the uncommented-on absence of a veto clause in other provisions of the Act says nothing whatever about (i) whether Congress considered the veto clause in Section 43 more important, or less important, than other veto clauses it has adopted or (ii) whether Congress would not have enacted the duty-to-hire provisions of Section 43 without it.

lation Act" persuaded "that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act" (Pet. App. 28a). "[W]hat evidence there is," the court declared, "indicates that Congress had a strong, humanitarian desire to provide for airline employee protection" during the deregulation process (*id.* at 19a, 22a). "In contrast," the court noted, "there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan" (*id.* at 28a). In short, the court concluded, given the only two choices that a court has when it strikes a portion of a statute (*id.* at 19a)

> the evidence * * * positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan.

As we show below, the court of appeals read the legislative history correctly. There is strong support for employee protection, but, in the entire history of Section 43, the legislative veto is mentioned only twice—once in a sentence in the Senate Report, which ties it to the assistance provisions and not the duty-to-hire provisions, and once in a routine comment by one Representative.

a. *Initiation Of The Bill In The Senate*

The airline regulatory system established in 1938 "subjected airlines to extensive economic regulation by the Civil Aeronautics Board" (*Leg. Hist.* v) (Introduction by Harold T. (Bizz) Johnson, Chairman, Committee on Public Works and Transportation).

> If an airline wished to change the cities it served or the prices it charged, it was required to seek

> permission from the Civil Aeronautics Board. The Board could refuse to allow the airline to take actions which would benefit consumers and which the airline believed to be in its best interest. Even if the Board ultimately granted an airline's request, there could be years of delay before the airline could implement its proposal [(*Leg. Hist.* v) (same)].

After forty years of an airline regulatory structure that had "outlived its usefulness" (*Leg. Hist.* v) (same), Congress enacted the Airline Deregulation Act of 1978, a "landmark" and "historic" reform which "free[d] the airline industry from excessive economic regulation" (*Leg. Hist.* v-vi) (same).[18] Because of the dramatic changes contemplated by this legislation, however, Congress determined that the "movement to a more competitive airline system should be made without major disruptions to the industry or the traveling public" (S. Rep. 95-631, at 5; *Leg. Hist.* 171). Accordingly, among other provisions, the Senate Bill contained an employee protection plan substantially identical to the version that was eventually enacted as Section 43 (S. Rep. 95-631, at 46-48; *Leg. Hist.* 212-214).

In the report that accompanied the bill when it reached the Senate floor, the legislators made clear that employee protection was a central concern. Some airlines, the Senate Report noted, may well "encounter such difficulties in adjusting that they will lose enough traffic to cause a major reduction in their total labor force" (S. Rep. 95-631, at 113; *Leg.*

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[18] The Senate Report described the new legislation as "a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation" (S. Rep. 95-631, at 52; *Leg. Hist.* 218).

Hist. 279). This prospect, the Senate observed, while uncertain, "should not be ignored" (*ibid.*). Over the years, the Report continued, "[r]egulation has * * * had the effect of reducing the potential for major employment reductions in individual airlines" (*ibid.*); as a result, once the burdens of regulation are lifted "a major reduction might occur in the labor force of one or more airlines" (*ibid.*). The Senate felt strongly that "[a]irline employees have relied on the present regulatory system" both in "their decision to enter the industry" and in their decision to continue in the field "within the context of the regulatory system" (*id.* at 114; *Leg. Hist.* 280). The Senate put its concerns squarely (*ibid.*):

> Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

The Senate therefore proposed "a statutory employee protection program, as has been done in certain cases in the past" (S. Rep. 95-631, at 113; *Leg. Hist.* 279). Its report sheds considerable light on the intent of the legislators. First, if, as petitioners urge at length, the Senate evinced any "uncertainty" about the EPP (Br. 10), that uncertainty concerned solely

the financial assistance program, *not* the airlines' duty to hire dislocated employees. Thus, while the report reflected some passing concern about "the potential expenditure of Government funds" (S. Rep. 95-631, at 115; *Leg. Hist.* 281), it expressed no comparable concern over the duty-to-hire provisions. Indeed, the *only* reference in the Senate Report to congressional oversight of the Secretary's regulations stated that the "amount of [each monthly] payment would be * * * determined by regulations promulgated by the Department of Labor. These regulations will be subject to congressional review" (*id.* at 116; *Leg. Hist.* 282). The report gave no indication of any desire to oversee the Secretary's regulations relating to the duty to hire.

The Senate Report, then, corroborates the court of appeals' conclusion: Congress expressed substantial concern for employee welfare; and it paid little attention to legislative oversight. Moreover, what little interest the Senate expressed in exercising a reviewing power related solely to the assistance program, which has never become effective. The Senate said nothing indicating an interest in overseeing, let alone vetoing, regulations relating to the duty to hire.[19]

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[19] The strong support for the duty to hire, and the lack of concern to oversee related regulations, are both illustrated by the views of the Senators who refused to vote for the Senate Bill in committee. Senator Zorinsky objected to the bill because its employee protection program was not *limited* to a duty to hire. His alternative proposal would have retained virtually the identical duty-to-hire plan (S. Rep. 95-631, at 208-209; *Leg. Hist.* 374-375) (additional views of Sen. Zorinsky), for which, the Senator acknowledged, there was "precedent" (*id.* at 206; *Leg. Hist.* 372) (same). Senator Zorinsky would simply have excised the funding program,

b. *The Senate Debate On The Bill*

Senator Cannon sponsored the Deregulation Act on the Senate floor on April 19, 1978 (124 Cong. Rec. 10647 (1978); *Leg. Hist.* 396). While he discussed the employee protection program (*id.* at 10649; *Leg. Hist.* 399), he said nothing about a legislative veto power—or, for that matter, congressional oversight generally. Indeed, when Senator Cannon caused a summary of the EPP to be printed in the Record, the summary did not even indicate that the legislation contained a legislative veto (*ibid.*). See *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd *sub nom. Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1216 (1983).

Thereafter, during the debates on the bill, various Senators reaffirmed their support for the EPP, and no Senator ever said anything at all about the legislative veto. For example, Senator Zorinsky, consistent with the views he had expressed when the bill emerged

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which he believed might cost as much as $1 billion (*id.* at 207; *Leg. Hist.* 373) (same). From the opposite perspective, Senator Inouye objected to the bill because it did no go far enough in protecting employees from "the risks" of "large-scale employee cutbacks and other disruptions" (*id.* at 221; *Leg. Hist.* 387) (minority views of Sen. Inouye). The other two dissenting committee members were Senators Melcher and Goldwater. See *id.* at 222-224; *Leg. Hist.* 388-390 (minority views of Sen. Melcher) (expressing concern over "assuredly * * * wide spread unemployment and dislocation among the labor forces of the carriers"); *id.* at 225-228; *Leg. Hist.* 391-394 (minority views of Sen. Goldwater). Finally, one Senator who voted for the bill did so in part because the final bill, unlike the original version, included a "program to assist employees who might be dislocated" (*id.* at 216; *Leg. Hist.* 382) (additional views of Sen. Danforth).

from committee (see page 31 n.19, *supra*), proposed deleting the assistance program altogether, leaving only a duty to hire (124 Cong. Rec. 10674-10676 (1978); *Leg. Hist.* 443-446). Significantly, however, while Senator Zorinsky's proposal would have eliminated the assistance plan, it would, quite deliberately, have "liberal[ized]" the duty to hire, by expanding the definitions of "protected employee" and "qualifying dislocation" (*id.* at 10674-10675; *Leg. Hist.* 443-444). Senator Cannon, the floor manager of the bill, endorsed the duty-to-hire aspect of the amendment as a "good" "concept * * * [which] would insure that people have the opportunity to work, even though it is with another carrier" (*id.* at 10677; *Leg. Hist.* 448). After vigorous debate, in which one chief supporter of the Committee Bill opposed Senator Zorinsky's modification (see *id.* at 10677-10678; *Leg. Hist.* 448-450) (remarks of Sen. Danforth), the Senate rejected Senator Zorinsky's effort to scale down the EPP (*id.* at 10683; *Leg. Hist.* 458). It bears repeating that nowhere in this debate about whether to strengthen the duty to hire is there any mention of a role for regulations or the legislative veto.

The Senate lopsidedly rejected an amendment proposed by Senator Hatch that would have entirely eliminated the EPP (124 Cong. Rec. 10679, 10682 (1978); *Leg. Hist.* 451, 457).[20] After a strong defense of the EPP by two of its proponents (*id.* at 10682; *Leg. Hist.* 456-457) (remarks of Sens. Kennedy and Cannon), the Hatch amendment was de-

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[20] Although the Hatch amendment would have eliminated even the duty-to-hire provision, here, too, the only objection to the EPP expressed by Senator Hatch was to the costliness of the financial assistance provision (*id.* at 10679, 10682; *Leg. Hist.* 451, 457).

feated 85-7. Following renewed expressions of support for the deregulation bill—including, in particular, support for the EPP (see *id.* at 10695; *Leg. Hist.* 479 (remarks of Sen. Muskie))—the Senate overwhelmingly passed S.2493, providing for airline deregulation (*id.* at 10698; *Leg. Hist.* 485-486). In all of the debate, no one—neither a supporter, nor an opponent of the bill—said one word about the legislative veto.

c. *The House Bill*

The history of the Deregulation Act in the House confirms the same conclusions: Congress was very concerned about employee protection, and was not concerned about a legislative veto. The employee protection sections of the House Bill differed substantially from the Senate Bill, which eventually became law. The House Bill provided that the "authority granted [to airlines] by the [deregulation] bill may not be exercised until the Secretary of Labor certifies that employees affected by new authority are protected by arrangements no less favorable than those in * * * [certain sections of] the Interstate Commerce Act and * * * the Rail Passenger Service Act." These arrangements included benefits to be paid by employers, but "reimbursed from a separate account in the U.S. Treasury" (H.R. Rep. 95-1211, 95th Cong., 2d Sess. 22 (1978); *Leg. Hist.* 530). The House Bill had no legislative veto or other oversight provision.

The House Bill would have delegated substantial authority to the Secretary of Labor, who had to "certify" that employees were "protected" by arrangements "no less favorable" than those under two other transportation statutes before any of the authority granted by the deregulation bill could be exercised.

Yet, as noted, it provided no legislative oversight of the Secretary's determinations. The willingness of the House Committee on Public Works and Transportation to pass favorably on a bill with these features demonstrates both strong House support for employee protection and, even more significantly, a willingness to delegate substantial decision-making authority to the Secretary without legislative oversight.[21]

d. *The House Debates*

Employee protection provoked no controversy at all when the House debated the Deregulation Act. Congressman Anderson, who managed the bill on the floor, stated that one feature of the legislation "insure[d] that the costs of the transition to a more competitive system will not weigh too heavily * * * on airline employees" (124 Cong. Rec. 29526 (1978); *Leg. Hist.* 731) (statement of Rep. Anderson). Congressman Anderson made clear the House's concern that "regulatory reform * * * not have an undue impact on airline employees" (*ibid.*; *Leg. Hist.* 732) (same). Otherwise, the provision emerged from the House debates without comment; and, despite its broad delegation of power to the Secretary, it was adopted without any mention of legislative oversight.[22]

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[21] Congressman Levitas, the one Member of Congress who eventually commented on the legislative veto, supported the House Bill; and although he noted some disagreement with what he thought was the "precipitous[ness]" of the House Bill, he said nothing at this point about any need to insert a legislative veto (H.R. Rep. 95-1211, at 73; *Leg. Hist.* 581) (additional views of Rep. Levitas).

[22] Again, Congressman Levitas, as he had when the bill emerged from committee, spoke enthusiastically about the bill. Again, he did not mention the veto power (124 Cong.

The bill passed the House by a vote of 363 to 8 (124 Cong. Rec. 30708 (1978); *Leg. Hist.* 824-825).

e. *The Bill Reported By The Conference*

The final version of the EPP, as it emerged from conference, was "basically the same as the Senate bill" (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 105 (1978); *Leg. Hist.* 947) (listing the differences). The Conference Report gives no indication that there was any consideration in conference of eliminating the EPP; and, except in the text and summary of the bill itself, the report makes no mention of a legislative veto. Thereafter, when the two chambers considered the final bill, the legislators again stressed their support for the EPP. See 124 Cong. Rec. 37416 (1978); *Leg. Hist.* 968 (statement of Sen. Cannon) (characterizing the EPP as an "important protection[]" in the bill); *id.* at 37421; *Leg. Hist.* 975 (statement of Sen. Stevenson); *id.* at 38522; *Leg. Hist.* 981 (statement of Rep. Snyder); *id.* at 38523; *Leg. Hist.* 984 (statement of Rep. Johnson). Indeed, two members of the House expressed their regrets that the EPP had not been made even *stronger*. See *id.* at 38523; *Leg. Hist.* 983 (statement of Rep. Harsha); *id.* at 38524-38525; *Leg. Hist.* 986 (statement of Rep. Mineta). But Congressman Anderson, who had managed the Conference Bill on the floor (*id.* at 38521; *Leg. Hist.* 980), assured the other

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Rec. 29529-29530, 30671 (1978); *Leg. Hist.* 737-738, 760) (statement of Rep. Levitas). Indeed, the Congressman expressed his view that the House Bill—which did not contain a veto clause—was "far superior to the bill of the other body in every respect" (*id.* at 30671; *Leg. Hist.* 760) (statement of Rep. Levitas). The Senate Bill, of course, did contain a legislative veto provision.

members of the House that the "conference provisions represent substantial progress for the airline employees" (*id.* at 38522; *Leg. Hist.* 981).

During this debate on the Conference Bill—indeed, during Congress' *entire* deliberation on the EPP—only *one* comment, by Congressman Levitas, was made about the legislative veto provision (*id.* at 38524; *Leg. Hist.* 985-986).[23] Plainly, however, even in Congressman Levitas' own consideration of the legislation, the veto provision played an insubstantial role. As noted above, he was a supporter of the House Bill, which would have delegated substantial authority to the Secretary and would have required that authority to be exercised before deregulation could even become operational, but he made no attempt to add a legislative veto provision, or any other oversight provision (see page 35 nn.21, 22, *supra*). The Congressman's remarks in the post-conference debate, as their tone reflects, are best understood as support for legislative vetoes in general—not as a belief that the veto had some special significance in the EPP.[24]

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[23] Representative Levitas stated: "Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law."

[24] Representative Levitas has been an ardent partisan of the legislative veto device and has supported its inclusion in a wide variety of statutes to cover all agency regulations. See, *e.g., Legislative Veto Proposals: Hearings on S. 890 and S. 684, Before the Subcomm. on Agency Administration of*

In sum, the legislative history amply supports the court of appeals' conclusion. Committees and leaders of Congress repeatedly expressed strong support for the EPP, insisting that displaced employees not bear an unfair portion of the costs of deregulation. By contrast, there is only one committee report reference to the legislative veto (and it relates the veto to the assistance program), and one Congressman on one occasion mentioned the legislative veto (and his comment was routine praise for a device he vigorously supported). On that record, there is simply no basis to conclude that Congress—had it known that the veto would one day be invalidated—would have

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the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 97 (1981); *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231, and Related Bills, Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 142 (1975). Indeed, Congressman Levitas' unusual devotion to the legislative veto was recognized by his colleagues in the House. In 1978, during the same period of time that the Deregulation Act was being considered in Congress, one Congressman paid tribute to Congressman Levitas' "leadership in the fight to establish a congressional veto over executive agency rules and regulations" (124 Cong. Rec. 19 7 (1978) (statement of Rep. Alexander)). Congressman Alexander described his colleague as "[u]ndaunted by an administration that opposes the concept of a legislative veto" and noted that Congressman Levitas had "time and again brought our attention to the need for such a veto through introduction of amendments to authorizing legislation for the various Federal agencies" (*ibid.*). Representative Levitas has continued his support of the legislative veto device, strongly expressing his view that this Court was mistaken in ruling as it did in *Chadha*. See, *e.g.*, 130 Cong. Rec. H2520 (daily ed. Apr. 10, 1984); *id.* at H10516 (daily ed. Oct. 1, 1984); Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 Hofstra L. Rev. 593, 613 (1984).

wished this Court to invalidate the balance of the EPP as well.

Petitioners' picture of "uncertainty" and "doubts" in Congress that labor protection was even necessary (Br. 34-37), their suggestion of congressional "concern" that the Department of Labor might not be "knowledgeable or even sympathetic to the objectives of the Deregulation Act" (Br. 38), and their assertion that "Congress left open many fundamental issues for subsequent resolution through administrative action subject to congressional review" (Br. 37) are all belied or totally unsupported by the legislative history. What petitioners describe as "uncertainty" about the need for labor protection was, as the court of appeals noted (Pet. App. 21a-22a), simply "the sincerely held belief in various legislative quarters that loss of employment in a deregulated industry was unlikely," not opposition to insurance in case it occurred. No one in Congress, not even those most optimistic about the future of deregulation, denied at least the possibility of employee dislocation; and no one spoke in opposition to establishing a duty-to-hire provision as insurance. See, *e.g.*, S. Rep. 95-631, at 206-211; *Leg. Hist.* 372-377 (additional views of Sen. Zorinsky). Nor is there a whisper in the legislative record that Congress doubted either the ability or willingness of DOL to administer the program; certainly petitioners point to no evidence of this.[25] Finally, at least in the duty-to-hire provisions, Con-

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[25] Indeed, contrary to petitioners' suggestion (Br. 38), the Department of Labor had had significant regulatory responsibilities for other employee protection programs. See, *e.g.*, Rail Passenger Service Act, 45 U.S.C. 565(b); Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 *et seq.*

gress did *not* leave open "many fundamental issues" (Pet. Br. 37) for regulatory resolution.

Petitioners' suggestion that the legislative veto was part of a compromise at conference is also without foundation. Petitioners note that in conference the Congress deleted a "qualifying dislocation" requirement applicable to the duty-to-hire provisions, with the effect, they say, of "provid[ing] less guidance to DOL regarding the duty-to-hire authority" (Br. 41). At the same time, petitioners contend, Congress strengthened the oversight requirements of the EPP —by adding the six-month rule and the report-and-wait provision—while simultaneously deleting a veto provision elsewhere in the bill (Br. 41-42). "By strengthening the Section 43 veto in conference, and at the same time removing a veto provision from a section that was at least as controversial as Section 43, Congress unmistakably demonstrated its serious reservations about the regulatory authority delegated to DOL" (Br. 44).

Petitioners' claims were correctly rejected by the court of appeals (Pet. App. 26a-28a). The removal of the "qualifying dislocation" requirement did potentially expand the class of protected employees (and thus is further evidence of congressional enthusiasm for the duty to hire), but it had no stated, or logical, relationship either to the Secretary's regulations or to the power to veto them. If Congress believed that by removing this requirement it was investing DOL with some new and less fettered authority, or if it perceived any tie between this step and the matter of legislative oversight, it never said so. The decision to remove the veto provision in a wholly unrelated part of the Act says nothing at all about the failure to delete a legislative veto in the EPP; again, Con-

gress gave no expression to the motivations petitioners ascribe to it. Finally, the addition in conference of the six-month deadline and the report-and-wait rule are, at best, equivocal evidence: the former suggests a desire to proceed promptly with implementation, while the latter, as the Court recognized in *Chadha* (see page 25 n.15, *supra*), reduced the importance of the veto provision; in any event, no one in Congress suggested that these steps were part of any compromise. Indeed, apart from the lone reference to the legislative veto by Congressman Levitas,[26] the *only* discussion of the EPP after conference, in either House, consisted of either wholesale approval (see, *e.g.*, *id.* at 38523; *Leg. Hist.* 983 (statement of Rep. (statement of Sen. Cannon); *id.* at 38522; *Leg. Hist.* 981 (statement of Rep. Snyder)), or regrets that the protections had not been made even stronger (see, *e.g.*, *id.* at 38523; *Leg. Hist.* 983 (statement of Rep. Harsha); *id.* at 38524-38525; *Leg. Hist.* 986 (statement of Rep. Mineta). In fact, the only real evidence

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[26] Petitioners maintain that Congressman Levitas tried to "persuade" a "skeptical House" to "acquiesce" in the Senate's approach to the EPP, by "emphasizing the importance of the legislative veto" (Br. 43). As our previous discussion indicates, Congressman Levitas was not trying to "persuade" anyone, nor were his colleagues "skeptical" about the bill. The Congressman was simply extolling the presence of a legislative veto in this bill—a theme, we have noted, he returned to on numerous occasions in a variety of contexts. Moreover, as the court of appeals correctly observed (Pet. App. 27a-28a), those few members of the House who were, indeed, "skeptical" felt that the employee protections did not go far enough. As the court of appeals put it, "[i]t seems * * * unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy" (Pet. App. 28a).

of what *Congress* thought had been done to the EPP in conference was expressed by the House floor manager, Congressman Anderson; he assured his colleagues that the Conference Bill on employee protections had been made "considerably stronger than the Senate bill" (*id.* at 38522; *Leg. Hist.* 981).

Thus, the debate on the EPP ended in conference just as it had begun in the Senate: Congress maintained its support for a strong EPP, and paid virtually no attention—let alone "emphatic" attention (Br. 45)—to the presence of a legislative veto.[27]

CONCLUSION

Congress spoke plainly when it enacted the EPP. It sought deliberately to protect airline employees in order that "the benefits to the public which result from its decision to alter substantially the regulation of air transportation * * * not [be] paid for by a minority—the airline employees and their families

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[27] Based on this legislative record, the case for severability is far stronger here than it was in *Chadha*. In *Chadha* the Court found in the history of related immigration legislation that "Congress was reluctant to delegate final authority over cancellation of deportations" (462 U.S. at 932), and thus that, at least to some extent, "Congress[] desire[d] to retain a veto in this area" (*id.* at 934). Similarly, in *Consumer Energy Council*, 673 F.2d 425, which this Court affirmed without opinion, 463 U.S. 1216, the court of appeals, while finding severable a legislative veto attached to a portion of the Natural Gas Policy Act of 1978, conceded that there were "contradictory comments about the importance of [the legislative veto]" (673 F.2d at 442), including statements on the floor that a key portion of the legislation "could be rejected by legislative veto" (*id.* at 442-443). By contrast, there is no evidence on this record that anyone in Congress was concerned about the power to veto regulations connected with the duty to hire.

who have relied on the present system" (S. Rep. 95-631, at 114; *Leg. Hist.* 280). The duty-to-hire provisions of Section 43—the only provisions ever to become operational—impose a direct obligation on air carriers, an obligation that was not made dependent on regulations or subject to veto. The EPP was overwhelmingly approved by both Houses of Congress; and not once in either House—not in committee, not on the floor, and not in conference—did anyone in Congress suggest, even obliquely, that legislative oversight of the EPP regulations was important. The veto was simply of no visible concern to anyone.

Given the only two choices that were available to the court of appeals once the legislative veto was invalidated, that court made the right selection. Petitioner's alternative approach—requiring courts to search the record for any evidence that Congress might have passed a different statute if it had known that there would be no veto provision—is truly a rule of judicial nullification. But statutes, as Judge (later Mr. Justice) Cardozo once said, "are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy * * * Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert" (*People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 62-63, 129 N.E. 202, 207-208 (1920). The court of appeals saved the balance of Section 43 and left to Congress the choice of how, if at all, to amend it, in light of the veto's demise. That was exactly what the law requires.

For all of the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT
ASSOCIATION OF FLIGHT ATTENDANTS

MATTHEW R. FINKELSTEIN
Counsel of Record
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 328-5400

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QUESTION PRESENTED

Is it evident that Congress would not have given the Department of Labor authority to issue regulations implementing the "right of first hire" contained in section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982), absent the legislative veto in that section?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)

TABLE OF CONTENTS ..... (iii)

TABLE OF AUTHORITIES ..... (v)

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. CONGRESS WOULD HAVE PASSED THE FIRST-HIRE PROGRAM WITHOUT THE VETO BECAUSE IT HAD A STRONG COMMITMENT TO LABOR PROTECTION, HAD NO SPECIFIC RESERVATIONS ABOUT THE FIRST-HIRE PROGRAM, AND PLACED LITTLE EMPHASIS ON THE LEGISLATIVE VETO 5

A. The Test For Severability 5

1. Presumptions of Severability 5

2. The Court of Appeals Test 8

B. Congress Was Deeply Committed To Labor Protection 10

C. Congress Had No Specific Concerns About The First-Hire Plan, In Contrast To The Compensation Plan 17

D. Congress Did Not Place Great Emphasis On The Legislative Veto, And What Importance It Had Related To The Compensation Program 19

E. Petitioners' Arguments About The Veto Are Unsupported By The Legislative History 21

Page

II. THE LANGUAGE AND STRUCTURE OF THE STATUTE SUGGEST THAT THE VETO WAS NOT AN INTEGRAL PART OF THE FIRST-HIRE PROGRAM 23

A. The First-Hire Program Is Specific And Left No Important Issues For The Secretary To Decide 23

B. The First-Hire Program Is Not Integrally Related To The Compensation Program 25

C. The Presence Of The Veto Is Not Significant In And Of Itself 26

D. Congressional Review Procedures Are Unique But Weak 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases	Page
Air Line Pilots Association v. Department of Transportation, No. 85-1178 (D.C. Cir. May 16, 1986)	11
Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985)	*passim*
Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169 (1961)	10
Buckley v. Valeo, 424 U.S. 1 (1976)	5
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)	5
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	*passim*
McDonald v. Piedmont Aviation, Inc., 625 F. Supp. 762 (S.D.N.Y. 1986)	25
Muller Optical v. EEOC, 743 F.2d 380 (6th Cir. 1984)	6
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	5
Regan v. Time, Inc., 104 S. Ct. 3262 (1984)	5
Tilton v. Richardson, 403 U.S. 672 (1971)	5
United States v. Lowden, 308 U.S. 225 (1939)	9
Western Airlines v. C.A.B., 194 F.2d 211 (9th Cir. 1952)	11

Page

Statutory Provisions

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982)) ..... *passim*
Section 43, 49 U.S.C. app. § 1552 (1982) (Employee Protection Program) ..... *passim*

Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended in scattered sections of 49 U.S.C. app. (1982)) 6

49 U.S.C. app. § 1301 6

Impoundment Control Act of 1974, 2 U.S.C. §§ 681-88 (1982) 7

Rail Passenger Service Act of 1970, 45 U.S.C. § 565 (1982) 10, 11, 16

Rail Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 836 (1982) 11

Regional Rail Reorganization Act of 1973, Pub. L. 93-236, Title V. § 505, 509, 87 Stat. 1015, 1020 (formerly 49 U.S.C. §§ 775, 779) (repealed) 11

Reorganization Act of 1977, 5 U.S.C. §§ 901-02 (1982) 7

Transportation Act of 1940, Act of September 18, 1940, c. 722, 54 Stat. 906, 907, 49 U.S.C. § 11347 (1982) (formerly codified at 49 U.S.C. § 5(2)(f)) 10, 16

Agency Decisions

Allegheny-Mohawk Merger Case, 59 C.A.B. 22 (1972) 11

St. Paul Bridge and Terminal Railway Co. Control, 199 I.C.C. 588 (1934) 10

United-Capitol Merger Case, 33 C.A.B. 307 (1961) 11

Page

United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950) *aff'd sub nom. Western Airlines v. C.A.B.*, 194 F.2d 211 (9th Cir. 1952) 11

Legislative Materials

H.R. 8813, 95th Cong., 1st Sess. (1977) 12

H.R. 12611, 95th Cong., 2d Sess. (1978) 16

S. 689, 95th Cong., 1st Sess. (1977) 13

S. 2493, 95th Cong., 2d Sess. (1978) ..... *passim*

H.R. Rep. No. 1779, 95th Cong., 2d Sess. (1978) 17

S. Rep. No. 631, 95th Cong., 2d Sess. (1978) ..... *passim*

Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation on H.R. 8813, 95th Cong., 1st Sess. (1977) 12

Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation on S. 292 and S. 689, 95th Cong., 1st Sess. (1977) 13

124 Cong. Rec. 10649 (1978) 20

124 Cong. Rec. 10674 (1978) 18

124 Cong. Rec. 10675 (1978) 18

124 Cong. Rec. 10676 (1978) 18

124 Cong. Rec. 10678 (1978) 19

124 Cong. Rec. 10679 (1978) 18

124 Cong. Rec. 10680 (1978) 19

Page

124 Cong. Rec. 10681 (1978) 19

124 Cong. Rec. 10682 (1978) 16, 18

124 Cong. Rec. 10683 (1978) 18

124 Cong. Rec. 38524 (1978) 21

124 Cong. Rec. 38525 (1978) 17

Miscellaneous

Blumberg, *Collective Layoffs; Protection of Employees Against Dismissal or Displacement as a Result of Mergers, Closings, or Work Transfers*, 26 Am. J. Comp. L. 277 (Supp.) (1978) 10

Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 Colum. L. Rev. 1808 (1985) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-920

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENT ASSOCIATION OF FLIGHT ATTENDANTS

SUMMARY OF ARGUMENT

The unconstitutional one-house veto in section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552 (1982), should be severed from the first-hire provisions challenged in this case since both the legislative history and the structure of section 43 provide overwhelming evidence that Congress would have passed the exact first-hire program absent the veto. In addition, several presumptions of severability apply. The evidence to support severability is so strong that severability can be found under any reading

of this Court's decision in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983).

Congress has been providing labor protections in transportation industries for over 50 years, and the legislative history overflows with statements of congressional concern about the need to protect airline workers from the brave new world of airline deregulation. Sentiment favoring labor protection was strong in both chambers, and both the House and Senate passed generous bills patterned after protections provided railroad workers during governmentally caused changes to their industry.

The Senate committee report on the provisions which, with some modifications, became section 43 explained that Congress felt an almost moral obligation to protect airline workers who had for forty years relied on a totally regulated airline system. The committee even suggested that the public could not have the benefits of deregulation without providing for labor protection. S. Rep. No. 631, 95th Cong., 2d Sess. 113-15 (1978). Perhaps the most striking example of the depth of support for labor protection was the 85 to 7 defeat of an amendment introduced by Senator Hatch to delete the labor protection provisions from the primary deregulation bill.

The only reservations Congress had about protecting labor concerned a compensation program that some Senators felt could cost more than a billion dollars a year, and the Senate committee report's discussion of the veto ties it to the compensation program. *Id.* at 116. In contrast, it is virtually impossible to find a specific criticism of the first-hire proposal. If there are any congressional statements with the first-hire program as the subject, and a criticism of it as the predicate, Petitioners have failed to produce them.

There is nothing in the legislative history to suggest that the veto was ultimately considered of great importance, *even* to the compensation program which could always be controlled through appropriations. In the debate in the Senate concerning the compensation program, neither the proponents nor the opponents of compensation cited the veto. Outside of the discussion in the Senate report tying the veto to the compensation program, the only other extended comment on the veto in the entire legislative history came from Representative Levitas who, after the bill had returned from conference, noted that it was a good thing that the bill, like other statutes that year, contained a veto. Since Levitas had earlier introduced a bill with a stronger labor protection provision, but without a veto, it is unlikely that even he considered the veto integral to section 43.

Petitioners' efforts to come up with reasons why Congress might have felt the veto was important to the first-program seem strained. The suggestion that Congress was motivated to include the veto by misgivings about turning the program over from the Department of Transportation to the Department of Labor, Brief for Petitioners at 38-39, does not make sense since the House wanted DOT to implement the program precisely because it was pro-labor. The theory that Congress wanted a veto because it was concerned that the Department of Labor regulations might "thwart the Deregulation Act's overall purpose by overburdening covered carriers," Brief for Petitioners at 30, is unsupported by any remarks in the legislative history or any possible explanation of how the innocuous first-hire program could bring down the Deregulation Act.

In addition, the theory that the House wanted a veto because the conference chose a Senate approach to em-

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ployee protection that was "unprecedented in design and scope," Brief for Petitioners at 43 n.53, does not make sense in light of the fact that the conference bill was weaker than the House bill. And the theory that congressional control over the first-hire program was increased in conference because the first-hire program was made less clear, Brief for Petitioners at 41, overstates the conference change, and ignores a better explanation for the increased control – Senate misgivings over loosening up the compensation program.

The structure of the Act also demonstrates that the veto was not an integral part of the first-hire program. Section 43 specifies in great detail who is eligible and what they are eligible for, and leaves no important details for the Secretary of Labor to decide in issuing regulations. Moreover, while the statute instructs the Secretary of Labor to issue regulations concerning the compensation program, no such requirement exists concerning the arguably self-implementing first-hire program. If the regulations were supposed to decide some issues of crucial interest to Congress, Congress would have mandated that regulations be issued.

Petitioners' arguments about the structure of the Act – that section 43 was the only provision with a veto, and that section 43 contains a unique combination of review procedures – are without merit. The first argument says little more than that the veto is important because it is there, and the second ignores the fact that the review provisions, although unique, are mild in comparison to some other statutes.

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ARGUMENT

I. CONGRESS WOULD HAVE PASSED THE FIRST-HIRE PROGRAM WITHOUT THE VETO BECAUSE IT HAD A STRONG COMMITMENT TO LABOR PROTECTION, HAD NO SPECIFIC RESERVATIONS ABOUT THE FIRST-HIRE PROGRAM, AND PLACED LITTLE EMPHASIS ON THE LEGISLATIVE VETO.

A. The Test For Severability

Whether an unconstitutional provision is severable is largely a question of legislative intent. *See Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (1984). This argument therefore focuses on the legislative history and the structure of the Deregulation Act, which together clearly demonstrate that Congress would have passed section 43 without the veto.

1. *Presumptions of Severability*

Although the intent of the legislature is clear in this case, several presumptions of severability also apply. First, there is an implicit presumption of severability in *Chadha's* requirement of severance "unless it is evident" that Congress would not have passed the bill without the veto, 462 U.S. at 931-32 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)), as opposed to a requirement of inseverability unless it is evident that Congress would have passed the bill without the veto. This implicit presumption is in keeping with this Court's view that "The cardinal principle of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

Second, "[a] provision is further presumed severable if what remains after severance 'is fully operable as a law.'"

Chadha, 462 U.S. at 934. The operability of the detailed first-hire provisions in section 43 is attested to, both empirically and conceptually, by the fact that the Department of Labor first-hire program is now in effect.

Third, severability is also presumed where there is a severability clause. *Id.* at 932. The Deregulation Act is expressly an act to amend the Federal Aviation Act of 1958, Pub. L. No. 95-504, 92 Stat. 1705, 1705, which in turn contains a severability clause. 49 U.S.C. app. § 1301. Although section 43 does not itself amend a specific section of the Federal Aviation Act, it was an integral part of the Deregulation Act and there is no evidence that Congress had fewer concerns about saving the first-hire program from constitutional challenge than it did about saving other portions of the Deregulation Act.

There are other important reasons to presume severability in this case. This case involves a statutory provision passed six years before this Court's unexpected conclusions in *Chadha,* and severance would work a severe and inequitable hardship on the unemployed airline workers who are obtaining jobs under the first-hire program. The veto was never exercised in this case, and thus there has not been any direct offense to the principles of bicameralism and presentment. *Cf. Muller Optical Co. v. EEOC,* 743 F.2d 380, 386-88 (6th Cir. 1984) (mere existence of unexercised veto not unconstitutional where delegation of authority provides sufficient standards to executive branch) (challenged regulations issued prior to *Chadha*). Although the first-hire regulations were issued after the decision in *Chadha,* and Congress could not have exercised a valid one-house veto, Congress has had ample time to take some valid action, particularly since the regulations were sent to Congress under report-and-wait procedures.

Instead, Congress has greeted the regulations with total indifference, and there is no controversy in this case between the Congress and the executive. Moreover, this case does not involve a statute that would be otherwise constitutionally suspect absent the veto. Nor does it involve a broad delegation of authority such as the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-88 (1982), or the Reorganization Act of 1977, 5 U.S.C. §§ 901-02 (1982). *See generally* Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions,* 85 Colum. L. Rev. 1808, 1824-27 (1985) (severability should be presumed in cases of narrowly delegated rulemaking authority, such as section 43, and inseverability should be presumed where statutes broadly delegate authority, such as the Impoundment Control Act).

The underlying controversy in this case is not between the branches of government, but between the 95th Congress, which decided that carriers should hire certain employees, and the airlines, who do not want to hire these employees. The proper forum for this challenge was through lobbying in 1977 and 1978. Unable to convince Congress in 1978, Petitioners now claim injury because regulations are in effect which Congress might have challenged had the veto been constitutional. This injury is speculative and remote, particularly since Petitioners' real problem is with a policy Congress has already decided. Where injury to the Constitution and to the Petitioners is tenuous, severability should be presumed.

Even without these presumptions, the legislative intent is clear enough to warrant severability. This clear legislative intent also leads to severability regardless of how *Chadha's* test for severability is interpreted, a subject of discussion in the courts below.

2. *The Court of Appeals Test*

Petitioners argue that the Court of Appeals incorrectly required a showing that "Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto," and inappropriately excluded evidence that Congress would have passed some other bill without the veto. Brief for Petitioners at 15-16, 26-28. This argument misreads the Court of Appeals decision. After explicitly stating that it was following *Chadha,* the Court of Appeals appears to say that realistically, it has two choices when confronted with a statute with a veto. It can strike down the law altogether, or uphold it without the veto. Which of these choices, based on the legislative history, would Congress have preferred? Whether Congress would have preferred no bill at all, the question which Petitioners claim is inappropriate, appears in this Court's analysis in *Chadha.* For in finding severability, this Court placed emphasis on the fact that "there is insufficient evidence that Congress would have continued to subject itself to the onerous burden of private bills had it known that § 244(c)(2) would be held unconstitutional." 462 U.S. at 934. In other words, there was insufficient evidence in *Chadha* that Congress would have preferred no bill at all, which would have meant a return to private bills to prevent deportation.

The Court of Appeals did not exclude evidence that Congress might have passed a different bill, it simply found it unpersuasive. For example, after evaluating the legislative history, the Court of Appeals simply found "no evidence that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." . . . "Nor have we found any indication that the Senate's agreement to the minor modifications in its version was premised on a 'strengthening' of the

veto provision." 766 F.2d at 1565 (27a-28a). Thus, the Court of Appeals did not exclude evidence from consideration, it simply could not find the evidence to which Petitioners refer.

Nor is there anything inherent in the Court of Appeals severability test that would exclude from consideration evidence that Congress was interested in alternative bills. In this regard, the Court of Appeals decision could be read to say that: "Assuming that Congress might have expressed interest in alternative bills without the veto, would it *nevertheless* have passed this exact statute if the choice were this exact statute or no bill at all?" Under this reading, an expressed congressional preference for an alternate bill, if compelling enough, might in some cases provide evidence that Congress would have preferred no bill at all to the bill without the veto. In other words, it would provide evidence that Congress would not have passed the bill *sans* veto. *Chadha,* 462 U.S. at 931-32. The existence of congressional preferences for alternatives is always an issue for the court, it is simply not the ultimate issue.

In contrast, the District Court and Petitioners seem to consider the issue of preference for alternative legislation to be the ultimate issue. Brief for Petitioners at 14-15. Petitioners suggest that unless it can be shown that Congress would not have changed one word without the veto, inseverability is required. This would be true even if Congress, faced with the choice, would have preferred the bill that passed to no bill at all. This exacting standard, if it is indeed what the District Court is suggesting, would doom all laws with legislative vetoes unless it was evident that the vetoes were totally superfluous. But since the veto in the first-hire program before this Court is superfluous, as will be discussed in the detailed discussion of the legislative his-

tory that follows, the program should survive under even the exacting District Court standard.

B. Congress Was Deeply Committed To Labor Protection

Since the federal government had provided labor protection provisions for railroad workers for over half a century[1] and in the aviation industry for over thirty

[1]The Interstate Commerce Commission began requiring labor protections in approved transactions in 1934 in the case of *St. Paul Bridge and Terminal Railway Co. Control,* 199 I.C.C. 588 (1934). Its authority to do so was upheld in the case of *United States v. Lowden,* 308 U.S. 225 (1939). In that case, the I.C.C. approved the lease of a railroad on condition that retained employees be compensated for five years for loss of salary and dismissed employees be partially compensated for their losses.

In an effort to head off federally controlled unification of the railroads, the railroads and unions entered into the Washington Job Protective Agreement of 1936. That agreement provided, among other things, that employees affected by consolidation would receive five years of supplementary compensation if they were placed in lower paying jobs, and would receive 60% of their salary for up to five years, depending on length of service, if they lost their jobs. Blumberg, *Collective Layoffs: Protection of Employees Against Dismissal or Displacement as a Result of Mergers, Closings, or Work Transfers,* 26 Am. J. Comp. L. 277, 278 (Supp.) (1978) (citation omitted).

Explicit and comprehensive statutory labor protection provisions were codified in 1940 when the Transportation Act of 1940, 54 Stat. 906, 907 brought section 5(2)(f) into the Interstate Commerce Act (now codified at 49 U.S.C. § 11347 (1982)). Section 5(2)(f) instructs the I.C.C. to require "a fair and equitable arrangement" to protect the interests of the railroad employees affected by mergers and to "include terms and conditions providing that during the period of four years from the effective date of such order such transactions will not result in employees . . . being in a worse position with respect to employment . . . ." *Id.* Monetary compensation, and not a job freeze, is adequate to meet this requirement. *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 173-178 (1961).

In a major step beyond merger protection, The Rail Passenger Service Act of 1970, which led to the creation of Amtrak, stated that

years,[2] it was virtually inevitable that both the House and the Senate would include labor protection provisions in

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railroads had to provide "fair and equitable arrangements" to protect employees affected by route discontinuations. These arrangements had to be approved by the Secretary of Labor and were to be no less than those provided for in section 5(2)(f) of the Interstate Commerce Act. 45 U.S.C. § 565 (1982). As discussed above, section 5(2)(f) set a *floor* of at least four years of monetary compensation.

Further statutory protections were provided in the Regional Rail Reorganization Act of 1973 which was designed to reorganize and operate the failing Northeastern rail system. Pub. L. 93-236, Title V. §§ 505, 509, 87 Stat. 1015, 1020 (formerly 49 U.S.C. §§ 775, 779) (repealed). Its provisions were "reaffirmed and expanded to cover railroads on a national, rather than regional basis" by the Rail Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 836 (1982). *Blumberg, supra* at 10 this note.

[2]Labor protection provisions have been provided in the airline industry since at least 1950, primarily in merger cases since the C.A.B. preferred to avoid airline bankruptcies by seeking merger partners for failing airlines. *United-Western Acquisition of Air Carrier Property,* 11 C.A.B. 701 (1950), *aff'd sub nom. Western Airlines v. C.A.B.,* 194 F.2d 211 (9th Cir. 1952). The authority for requiring merger protections continued up to and through the passage of the Airline Deregulation Act. A relatively standard formula for employee protection was initiated in 1960 including four years of supplemental compensation for those whose new jobs are at a lower salary; a "dismissal allowance" for up to five years for those who lose their jobs, depending on the length of employment; and a fair and equitable integration of seniority lists. *United-Capital Merger Case,* 33 C.A.B. 307, 342-347 (1961), *Allegheny-Mohawk Merger Case,* 59 C.A.B. 22, 31-40 (1972).

Labor protection provisions in airline mergers have fallen into disfavor with the federal government since deregulation. In *Air Line Pilots Association v. Department of Transportation,* No. 85-1178, (D.C. Cir. May 16, 1986), the Court of Appeals upheld the Board's refusal to impose labor protections except in rare cases under a policy that labor protections were not in the spirit of deregulation. Slip. op. at 4-7. The court did note that "Congress could seek to spur deregulation while also attempting to lessen the blow on existing employees; in fact, it did just that in Section 43 of the Airline Deregulation Act . . . ." Slip. op. at 9.

the deregulation bills that were introduced and passed in the 95th Congress.

On the House side, a bill providing federally financed compensation for employees adversely affected by deregulation was introduced in the first session of the Congress. H.R. 8813, 95th Cong., 1st Sess. § 27 (1977). The bill was left "very broad, very loose" by its sponsor, Representative Anderson, because the implementing regulations were to be written by the pro-labor Secretary of Transportation, Brock Adams.[3]

---

[3]Representative Anderson testified:

> On the other one, the one for labor, we actually wanted to get something in there so that we can discuss it.
>
> But we put this in there kind of directing the Secretary of Transportation, Brock Adams – *again, he is the very man whose record in the past has been very, very prolabor,* and we instructed him to study this area so that there can be protections if there is going to be any problem, and we did leave it very broad, very loose.

Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation on H.R. 8813, 95th Cong., 1st Sess. 1022 (1977) (hereinafter cited as "House Hearings on H.R. 8813") (emphasis added).

Petitioners cite this quote, without the italicized portion using ellipsis marks, to suggest that the veto was added when control of the program was "transferred" from the Secretary of Transportation to the unfamiliar Department of Labor. Brief for Petitioners at 38 n.46 and accompanying text. But since the quote indicates a desire for a pro-labor agency to administer the statute, it is not clear what fears the House could have had about the Secretary of Labor. Representative Anderson reiterated his belief that the Secretary of Transportation would be favorable to labor in response to a complaint by a union witness that: "In other words, it could be a payoff of 1 year; it could be a payoff of 5 years; it could be nothing more than moving expenses. We do not have those answers." Anderson responded: "I again would feel, my feeling was – I suppose I was thinking of Brock Adams, who has a very good labor relations background in the Seattle area; and he is our Secretary and I suppose he and President Carter will be in at least for the next 3 years and our bill stops in 5 years." *Id.* at 1024.

On the Senate side, the primary deregulation bill during the first session, S. 689, contained no labor protection provision, but only because the bill sponsors, Senators Cannon and Kennedy, felt that deregulation would not lead to a loss of jobs.[4] Administration witnesses also expressed doubt that deregulation would lead to fewer jobs, but expressed support for labor protection provisions if necessary.[5]

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[4]Senator Kennedy stated: "The fear that airline employees will lose jobs because of regulatory reform has no evidence to support it anymore than the allegation that towns will lose service." *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation on S. 292 and S. 689,* 95th Cong., 1st Sess. 110 (1977) (hereinafter cited as "Senate Hearings"). Senator Cannon elaborated on this point in response to one witness: "But by saying there's going to be a loss of jobs, you are saying the free enterprise system won't work. What we are saying is that if you give the free enterprise system a chance . . . you are really going to promote more business." *Senate Hearings* at 1844.

[5]Charles Schultze, Chairman of the Council of Economic Advisers, expressed President Carter's concern over labor, stating: "In his message to the Congress, the President made it clear that the Administration recognizes an obligation to protect the legitimate interests of airline employees." Schultze expressed doubt that unemployment would result from deregulation, but added, "[I]f a case for protection can be made, we are prepared to work together with the Congress in determining what remedies might be appropriate." *Senate Hearings* at 279.

Secretary of Transportation Brock Adams echoed these sentiments, stated:

> We must not disregard the possible problems of the working men and women who have invested their lives in this industry. This is already provided for in merger cases. We should consider carefully what might occur in the event there is a failure in the system causing significant unemployment.
>
> We should, together with the unions and the carriers, identify the problems that might occur and strive to find equitable solutions for them.

Id. at 1369, 1370.

In response to union testimony that protections typical of the railroad industry were needed since they provided for federally funded compensation in bankruptcies and route discontinuations, as opposed to limited airline merger protections,[6] the primary Senate bill in the second session, S.2493, contained a federally funded compensation program for airline workers. The bill included monthly assistance payments for up to three years for a narrow class of employees in certain very specific cases. The bill also contained a first-hire program.[7]

The Senate committee on Commerce, Science, and Transportation sent S. 2493 to the floor by a vote of 13 to 3 along with a detailed report explaining why Congress felt a moral commitment to protect labor in the brave new world of deregulation. Because the labor protection provisions in S. 2493 essentially became section 43 of the Deregulation Act, this report is quoted here at length:

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[6] *See, e.g., Senate Hearings* at 717 (statement of Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters); *id.* at 1320 (testimony of William G. Mahoney, counsel to several airline-related unions).

[7] The bill provided:

(1) a maximum of three years of federally funded monthly assistance payments for employees with more than four years of service on the date of enactment of the bill who lost jobs or compensation on account of a bankruptcy or a 15 percent reduction in the workforce caused by, and within ten years of, the Deregulation Act;

(2) that employees receiving federal assistance payments must accept comparable work or else receive reduced benefits;

(3) that employees meeting the above eligiblity requirements have a first right of hire at any other carrier holding a certificate at the time of the Act's passage;

(4) that the Secretary of Labor would have power to issue regulations to administer the labor protection provisions; and

(5) that all rules and regulations must be submitted to Congress and would become effective 60 days after submission unless disapproved by either House. S. 2493, 95th Cong., 2d. Sess. § 22 (19078).

> The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. . . . The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.
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> . . . .
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> . . . .
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> . . . .
>
> . . . Many airline employes have given most of their working lives to the air transportation industry and have too much invested to leave it now. . . . Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be able to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.
>
> . . . Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority – the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong,, 2d Sess. 113-114 (1978) (hereinafter cited as "Senate Report").

In addition, the report indicates that the Senate considered labor protection as a trade-off for deregulation:

> The alternatives are clear: continued regulations and thus a continuing economic loss to the public, versus decreased regulation and, therefore, decreased loss to the public, potentially paid for by a temporary assistance program.

Id. at 115. Whether this trade-off was a moral one or a political one, or both, is uncertain. But it is clear that Congress felt that labor protection was such an integral part of the total bill that it would not pass it without labor protection. It is difficult to imagine stronger evidence of a congressional commitment to a provision, but such can be found in the 85 to 7 defeat of a floor amendment by Senator Hatch to eliminate the labor protection provisions entirely from the Act. 124 Cong. Rec. 10682 (discussed *infra* at 18).

The House adopted an even more expansive employee protection provision than the Senate version in the second session. H.R. 12611, approved by the House Public Works and Transportation committee, required that workers affected by new authority were to be protected by arrangements no less favorable than those in 5(2)(f) of the Interstate Commerce Act, and section 405 of the Rail Passenger Service Act, including subsequent amendments.[8] H.R. 12611, 95th Cong., 2d Sess. § 32 (1978). Like the Senate bill, H.R. 12611 would have ensured federal monetary benefits, but lacked the Senate restrictions on eligibility and length of payments. The labor protection provisions were completely uncontroversial on the House floor.

The conference provisions, somewhat more liberal than the Senate version, but more conservative than the House

[8]A discussion of the railroad laws is included *supra* at 10 n.2.

protections,[9] passed in both the Senate and House without significant challenge, although some Congressmen felt that the bill did not go far enough. *See* remarks of Representative Mineta, 124 Cong. Rec. 38525 (1978). The inclusion of labor protection provisions in the Act was never in doubt.

C. Congress Had No Specific Concerns About The First-Hire Plan, In Contrast To the Compensation Plan

While Congress overwhelmingly supported labor protection provisions, it did have some doubts about what the provisions would be. These doubts related to the compensation program, however, and not the first-hire program.

There is a dearth of statements in the legislative history reflecting either congressional criticism of the idea of a

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[9]Some of the major elements of the new bill were:

(1) the triggering limitation for compensation from the Senate bill was reduced from a 15 percent contraction of the workforce to a 7½ percent reduction (the House bill had no triggering limitation);

(2) the Senate limitation on all benefits to those with four years of experience was chosen over the more liberal provision in the House bill, which would have given benefits to any affected employee;

(3) the length of financial assistance payments from the Senate bill was increased from 36 to 72 months (the House had no explicit limits);

(4) a provision was added ordering the Secretary of Labor to issue the regulations implementing the monthly assistance payments plan and any other regulations he deemed necessary within six months of enactment;

(5) the triggering mechanism was eliminated from the Senate first-hire program (an industry-wide first-hire program was not present in the House bill); and

(6) a new provision was added requiring that thirty days before a rule became final it had to be submitted to the Senate Committee on Commerce, Science, and Transportation, and the House Committee on Public Works and Transportation. H.R. Rep. No. 1779, 95th Cong., 2d Sess. 48-51, 104-106 (1978).

first-hire program, or congressional concern about how such a program might be implemented. The Brief for Petitioners certainly does not cite any such criticisms.

In contrast, there was a great deal of criticism of the compensation program on the floor of the Senate where four amendments to the labor protection provisions were debated. Senator Zorinsky submitted an amendment to S. 2493 to eliminate the compensation program entirely, which would have left the first-hire program intact, citing a potential $1 billion price tag. This amendment was defeated narrowly by a vote of 43 to 48.[10] 124 Cong. Rec. 10674, 10675, 10676, 10683 (1978). Senator Hatch's attempt to *entirely* eliminate the employee protection program focused on the compensation provisions:

> I feel this provision is unwarranted and is a grossly unfair raid on the U.S. Treasury which could cost the American taxpayer in excess of $1 billion a year. Considering similar provisions in Amtrak (which has cost the taxpayers of this country $38 million since its inception in 1973) and ConRail (which has cost taxpayers $140 million since its inception in 1976), I am convinced that any concerns over the economic consequences of this provision are entirely warranted.

Id. at 10679. As noted above, the Hatch amendment was defeated by a dramatic 7 to 85. *Id.* at 10682. An amend-

[10]The remaining first-hire provision in the Zorinsky amendment would have been subject to a legislative veto. Zorinsky's action is described in the Brief for Petitioners as evidence of the importance of the veto to the first-hire program: "In fact, one proposed EPP included a veto provision applicable exclusively to the regulations implementing the duty-to-hire part of the program." Brief for Petitioners, p. 40, n.49.This statement has little weight when looked at in context, i.e. that the relationship between the veto and the first-hire provision was residual.

ment to liberalize the monthly assistance payments was defeated, and an amendment to restrict them passed. *Id.* at 10678, 10680, 10681, 10683. These four proposed amendments show that while the details of the compensation program were controversial, the merit and details of the first-hire program were not.

Over on the House side in the second session, where an even more generous bill was passed, there was no similiar hand-wringing over the labor protection provisions. The House had no specific opportunity to comment on the first-hire program until the conference bill came back containing one, and no negative comments were made. From introduction to passage, neither the House nor the Senate expressed specific reservations about the first-hire program.

D. Congress Did Not Place Great Emphasis On The Legislative Veto, And What Importance It Had Related To The Compensation Program.

The legislative veto originated in the Senate in S. 2493 and not in the House. Since the Senate was concerned about the compensation program, it follows that the importance of the veto was to maintain control over the compensation program. This deduction is affirmed by the Senate Report on S. 2493 which provides the only substantive explanation for the veto in the entire legislative history:

> Eligible employees who lost their jobs would be entitled to monthly assistance payments . . . . The amount of such payment would be equal to a percentage of former wages, as determined by the regulations promulgated by the Department

> of Labor. These regulations will be subject to congressional review.

Senate Report at 116.

Concerns over compensation may also explain why the congressional review provisions were "strengthened" in conference. The conference bill liberalized the Senate's compensation plan, and since the compensation plan was of concern to the Senate, it might be natural for the Senate to seek increased control.[11]

Although the legislative veto may, for these reasons, have been of some importance to Congress, it is doubtful that the veto and *even* the compensation plan were integrally related in the overall view of Congress. The House had never included legislative veto provisions in any of its expansive labor protection provisions. In introducing S. 2493 on the Senate floor, Senator Cannon described the labor protection provisions in his summary of the bill, but did not mention the veto provision. 124 Cong. Rec. 10649 (1978). And the veto provision never entered into the heated Senate debate over the compensation program where it might have been cited by defenders of the program if it was important. This absence of discussion probably stemmed from the fact that Congress did not ultimately need a veto to control the compensation program. It could always control it through appropriations.

Outside of the Senate report's discussion of the veto, the only other commentary came from Representative Levitas, a well-known advocate of legislative vetoes. After the conference had reported out its bill, Levitas made a passing remark that it was a good thing the bill, like some

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[11]Even this explanation may give the veto more importance than it had. *See* the Court of Appeals' discussion of the "strengthening" of the veto, quoted *supra* at 8-9, 766 F.2d at 1565.

other bills, had a veto.[12] As Levitas had been a sponsor of the more generous House bill, H.R. 12611, which had no veto provision, it is impossible to believe that even Levitas really felt that the veto was important. Since Congress cared deeply about labor protection, had no reservations about the first-hire program, and expressed little interest in the veto, it follows that the veto was superfluous to the first-hire program.

E. Petitioners' Arguments About The Veto Are Unsupported By The Legislative History.

Petitioners' version of the veto's *raison d'etre* – that it was included by the Senate as a check when it "transferred control over the EPP to DOL," Brief for Petitioners at 38-39, that it was included out of fear that the regulation might "thwart the Deregulation Act's overall purpose by overburdening covered carriers," Brief for Petitioners at 30, that it was strengthened in conference because the first-hire program was made more vague, Brief for Petitioners at 41, and that it was used to persuade "a skeptical House to acquiesce" in the Senate's unique approach to labor protection, Brief for Petitioners at 43 n. 53, – are based on an idiosyncratic reading of the legislative history.

The Senate bill in the first session simply did not have a labor protection provision, so it is difficult to see how the Senate bill "transferred" control from DOT to DOL. It

[12]Representative Levitas stated: "Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law." 124 Cong. Rec. 38524 (1978).

was the House bill in the first session that had a labor protection provision controlled by the Secretary of Transportation, and that was because he was supposed to be pro-labor. (The legislative history is discussed *supra* at 12, n. 3.) Petitioners' argument that the House would have been concerned about the liberality of the Department of Labor, when the Secretary of Transportation's pro-labor bias was considered as a plus, is self-contradicting.

Petitioners' argument that the veto was included because of fear that the Department of Labor might thwart the Deregulation Act's purpose by imposing upon pre-deregulation carriers is unsupported by any congressional statement, and it is not clear how hiring experienced airline employees over inexperienced employees could have a negative financial effect on a carrier. However, even if one were to agree that the first-hire program would have some small negative effect, this effect would result from a clear policy decision by the Congress and not as a result of some narrow discretionary matter that was left up to the Department of Labor. The DOL regulations would appear to have more of an effect on the airlines' feelings about hiring whomever they please rather than on their viability under deregulation.

The theory that the veto was strengthened in conference because the first-hire program became more vague gives the first-hire program an importance it never had. The first-hire program had to have played third fiddle, at best, to the discussion of the compensation program since this was so important to the Senate. Moreover, the first-hire program did not really become vague. Congress simply made a policy decision to eliminate the triggering mechanism.

Finally, the theory that a skeptical House somehow had to be convinced by the veto to buy what it considered a

watered-down conference version of its own program is illogical. Petitioners seem to concede the weakness of this theory when they state: "The veto therefore was necessary because section 43 was unique and untested, not because it was stronger or weaker than the EPP proposed by the House." (Brief for Petitioners at 43 n.53.) While Petitioners are correct that section 43, as finally written, was unique, it was not unique in any way that would have troubled the House. The only thing troubling the House when the bill reached the floor was that the bill had been weakened. At best, Petitioners' "uniqueness" argument might support a theory of why the House did not *object* to a legislative veto in the final bill, but not a theory of why the House would have insisted on one.

II. THE LANGUAGE AND STRUCTURE OF THE STATUTE SUGGEST THAT THE VETO WAS NOT INTEGRAL TO THE FIRST-HIRE PROGRAM.

A. The First-Hire Program Is Specific And Left No Important Issues For The Secretary To Decide.

An examination of the language and structure of section 43 reveals that the veto could not have been an essential part of the first-hire program. This is because the first-hire program is specific, and leaves no issues of importance for the Secretary of Labor to decide.

The statute defines every important aspect of the program:

(1) It defines who is eligible, namely, protected employees (a person who, on the date of enactment has been employed for at least four years by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act) who are furloughed or otherwise terminated (except for cause) prior to the last day of the 10-year period beginning on the date of enactment;

(2) It defines what they are eligible for, namely, the right of first hire, regardless of age, in their occupational speciality, by any other air carrier hiring additional employees which held a certificate issued under section 401 of the Federal Aviation Act of 1958 prior to the date of enactment of the Act;

(3) It defines what the carriers' obligations are, namely, to hire such an employee before they hire any other person, except that they may recall any of their own furloughed employees first; and

(4) It defines the seniority rights of the employees, namely, to retain their rights of seniority and recall with the original carrier while serving the carrier hiring them under the duty-to-hire plan.

Petitioners, however, state that Congress:

> left open many fundamental issues for subsequent resolution through administrative action subject to congressional review. These issues included . . . virtually all aspects of the duty to hire program, including what constitutes an 'occupational speciality,' how DOL's nationwide hiring program would operate, what showing would be required to qualify for the hiring preferences . . . .

Brief for Petitioners at 37. In reality, though, these aspects are simply the kind of routine decisions ordinarily delegated to federal agencies, and there is no indication that Congress cared about these issues. Moreover, it is difficult to even imagine a reason why Congress might have been concerned about these issues. Congress' concerns in passing the bill were with how to ease entry into new markets, how to ensure small community service, how to gradually remove controls from fares — in short, how to bring ge-

nuine competition into a system that had been regulated for decades. Although Congress was also concerned with protecting groups that might be hard hit, like labor, it goes too far to suggest that Congress was concerned with the minute details of how the labor protection provisions would work, except insofar as it would affect the U.S. Treasury.

That Congress was not particularly interested in regulating the first-hire program is further evidenced by the fact that the Secretary was required to write compensation regulations, but simply had the option of writing first-hire regulations, which even suggests that the first-hire right transcends the existence of regulations. *See McDonald v. Piedmont Aviation, Inc.*, 625 F. Supp. 762 (S.D.N.Y. 1986) (finding a private right of action independent of regulations). If Congress had felt strongly about tying the veto to the first-hire regulations, it would have insisted upon the Department of Labor issuing them.

B. The First-Hire Program Is Not Integrally Related To The Compensation Program

The Senate Report explains, to some degree, why the first-hire program was included in the bill. According to the report, the first-hire program, along with several other provisions, "will decrease the cash payments required under the program." *Senate Report* at 116. While it may therefore be true that the first-hire program has a role to play in the compensation program, there is no similar evidence that the compensation program, however suspect without the veto, is an essential part of the first-hire program. If they were essentially related, Congress would not have given the Secretary an option to write regulations in one area, and a requirement to do so in the other.

C. The Presence Of The Veto Is Not Significant In And Of Itself.

Petitioners argue that the veto must be integral to the first-hire program because section 43 is the only provision in the entire Deregulation Act that contains a legislative veto.

This argument is analogous to the argument that the veto in a hypothetical statute that is totally controlled by a veto must be important because most other statutes do not have vetoes. Both arguments basically assert that the veto is important simply because it is there, which, while true, does not shed light on *how* important the veto provision is.

D. Congressional Review Procedures Are Unique But Weak.

Finally, petitioners argue that section 43, by combining a veto, a report-and-wait provision, and a six-month deadline for issuing regulations, shows that Congress was very concerned about how the regulations would be written. Brief for Petitioners at 30-32. As previously noted, what concerns Congress had were with the financial aspects of the program, and whatever uniqueness exists in this arrangement was more likely aimed at controlling compensation. Moreover, this combination of features, while unique, is mild compared to other laws such as the Reorganization Act of 1977 which provided that:

> (A) resolution disapproving each reorganization plan would be automatically introduced in the House of Representatives and in the Senate on the first day of session allowing transmittal of the plan. 5 U.S.C. §§ 901-10. The plan would be reviewed by the Committee on Governmental Affairs of the Senate and by the Committee on

> Government Operations of the House and reported out of committee within 45 days. If the plan was not reported within 45 days, it would be placed on the calendar of the appropriate House for consideration. 5 U.S.C. § 911.

Muller Optical Co. v. EEOC, 743 F.2d 380, 382-83 (6th Cir. 1984). In comparison to an automatic disapproval resolution mechanism like this, section 43's review provisions are unique, but in a weak way.

CONCLUSION

A review of the legislative history and the statute supports the finding of the Court of Appeals that "there is not a shred of evidence that the veto provision was deemed a vital feature of the protection plan." 766 F.2d at 1565 (29a). The Court of Appeals' decision to sever the one house veto should therefore be affirmed.

Respectfully submitted,

MATTHEW H. FINUCANE
Counsel of Record
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 328-5400

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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT INTERVENORS BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS; FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND TRANSPORT WORKERS UNION OF AMERICA

WILLIAM J. BIRNEY
(Counsel of Record)

WILLIAM G. MAHONEY
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Respondent Intervenors BRAC, FEIA, IAMAW and TWU

Date: July 18, 1986

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly held that the legislative veto provision in Subsection (f)(3) of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552(f)(3), is severable from the remainder of Section 43 when the language and the legislative history of the Act demonstrate that the employee protection program established by Section 43 would have been enacted by Congress even in the absence of the legislative veto?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The Court Of Appeals Correctly Concluded That It Had Jurisdiction Over This Appeal	2
II. The Court Of Appeals Recognized And Correctly Applied The Proper Standard For Determining Severability	3
A. The Court Of Appeals' Severability Analysis Follows Long-Standing Precedent	3
B. The Well-Established Severability Standards Applied By The Court Of Appeals In This Case Do Not Violate The Constitutional Doctrine Of Separation Of Powers	10
III. The Court Of Appeals Considered And Properly Weighed Evidence Of Congressional Intent	14
A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Provision Is Severable From The Remainder Of The Statute	15
B. The Legislative History Demonstrates That The Legislative Veto Provision Is Severable From The Remainder Of The Statute	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES:	
Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985)	*passim*
American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1980)	7
Brotherhood of Railway and Airline Clerks, et al v. Alaska Airlines, Inc., et al, No. A-947	3
Buckley v. Valeo, 424 U.S. 1 (1976)	4,8
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)	4,12
El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87 (1909)	3
EEOC v. Allstate Insurance Co., 467 U.S. 1432 (1984)	2
Heckler v. Edwards, 465 U.S. 870 (1984)	2
Gulf Oil Corp. v. Dyke, 734 F.2d 797 (T.E.C.A.), *cert. denied*, ____U.S.____, 105 S.Ct. 173 (1984)	5,8-9
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	*passim*
McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978)	13-14
McDonald v. Piedmont Aviation, 625 F.Supp. 762 (S.D.N.Y. 1986)	17
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	3,14
Regan v. Time, ____U.S.____, 104 S.Ct. 3262 (1984)	3,4
Sibbach v. Wilson, 312 U.S. 1 (1941)	12
Tilton v. Richardson, 403 U.S. 672 (1971)	3
TVA v. Hill, 437 U.S. 153 (1978)	10,11
United States v. Jackson, 390 U.S. 570 (1968)	13
STATUTES AND OTHER MATERIALS:	
Airline Deregulation Act, Section 43, 49 U.S.C. § 1552	*passim*
Subsection 43(a), 49 U.S.C. app. § 1552(a)	15,16
Subsection 43(b), 49 U.S.C. app. § 1552(b)	13,15,16, 17

	Page
Subsection 43(c), 49 U.S.C. app. § 1552(c)	13,16
Subsection 43(d), 49 U.S.C. app. § 1552(d)	12,16,17
Subsection 43(f), 49 U.S.C. app. § 1552(f)	12,16
Subsection 43(f)(1), 49 U.S.C. app. § 1552(f)(1)	16,17
Subsection 43(f)(3), 49 U.S.C. app. § 1552(f)(3)	*passim*
Subsection 43(h)(1), 49 U.S.C. app. § 1552(h)(1)	15
Subsection 43(h)(2), 49 U.S.C. app. § 1552(h)(2)	15
Subsection 43(h)(4), 49 U.S.C. app. § 1552(h)(4)	15
Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.*	10
Federal Aviation Act, 49 U.S.C. app. § 1301	13
Milwaukee Railroad Restructuring Act, 45 U.S.C. § 901, *et seq.*	16
Northeast Rail Service Act of 1981, 45 U.S.C. § 797(b)	16
Railway Labor Act, 45 U.S.C. § 151, *et seq.*	1
Reorganization Act of 1977, 5 U.S.C. § 901, *et seq.*	2
Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*	16
H. Rep. 95-1211, 95th Cong., 2d Sess. 26 (1978)	6,18
H. Rep. 95-1779, 95th Cong., 2d Sess. 105 (1978)	7
S. Rep. 95-631, 95th Cong., 2d Sess. 113 (1978)	6,18-19
124 Cong. Rec. 38522 (1978) (statement of Rep. Anderson)	7
124 Cong. Rec. 38524 (1978) (statement of Rep. Mineta)	7
124 Cong. Rec. 38521-38525 (1978)	19
124 Cong. Rec. 5851 (daily ed. April 17, 1979)	19
124 Cong. Rec. 37416-37421 (daily ed. October 14, 1978)	19
129 Cong. Rec. H10578 (daily ed. Nov. 18, 1983)	12
28 U.S.C. § 1252	2

No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT INTERVENORS BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS; FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND TRANSPORT WORKERS UNION OF AMERICA

This brief is respectfully submitted on behalf of respondent intervenors Brotherhood of Railway and Airline Clerks ("BRAC"); Flight Engineers' International Association ("FEIA"); International Association of Machinists and Aerospace Workers ("IAM"); and Transport Workers Union of America ("TWU") (collectively, "BRAC, *et al.*"). These labor organizations are the duly authorized representatives of the majority of airline employees working under collective bargaining agreements, and they represent their members in all matters involving wages, rules, and working conditions pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

SUMMARY OF ARGUMENT

The court of appeals recognized and properly applied the well-established standards for determining severability enunciated by this Court, and it correctly concluded that the unconstitutional legislative veto provision in Subsection 43(f)(3) of the Airline Deregulation Act is severable from the remainder of Section 43.

ARGUMENT

I. The Court Of Appeals Correctly Concluded That It Had Jurisdiction Over This Appeal.

In a footnote, petitioners suggest that the court of appeals lacked jurisdiction over this appeal and that an appeal of the district court's decision should have been brought directly to this Court pursuant to 28 US.C. § 1252. Brief of Petitioners 13, n.13. Under 28 U.S.C. § 1252, the Supreme Court has jurisdiction over appeals from district court decisions holding federal statutues unconstitutional in civil actions to which the government is a party. However, in *EEOC v. Allstate Insurance Co.*, 467 U.S. 1432 (1984), the Court dismissed for want of jurisdiction an appeal taken pursuant to 28 U.S.C. § 1252 from a district court decision holding inseverable the legislative veto provision in the Reorganization Act of 1977, 5 U.S.C. § 901, *et seq.*

Petitioners acknowledge that the Court refused to accept jurisdiction in *Allstate,* but contend that this case is distinguishable because it involves a challenge to a decision holding that an entire statute is unconstitutional. Brief for Petitioners 13, n.13. However, the decision of the district court in this case, like the decision of the district court in *Allstate,* raises a question of statutory construction, and the issue presented on appeal is "the severability *vel non* of the remainder of the section in which the legislative veto appears." *Alaska Airlines, Inc. v. Donovan,* 766 F.2d 1550, 1555 (D.C. Cir. 1985). *See also Heckler v. Edwards,* 465 U.S. 870 (1984). Indeed, in opposing BRAC's application for a stay of the

judgment pending direct appeal to this Court from the decision of the district court, petitioners argued that BRAC had failed to show that this Court would note probable jurisdiction. According to petitioners, the district court's decision "did nothing more than apply well-established principles of statutory construction to a particular provision of the Airline Deregulation Act . . . ." Appellee's Opposition to Appellant's Application for Stay of Order and Final Judgment of the United States District Court for the District of Columbia 2-3 (May 22, 1984). *Brotherhood of Railway and Airline Clerks, et al. v. Alaska Airlines, Inc., et al.*, No. A-947.

II. The Court Of Appeals Recognized And Correctly Applied The Proper Standard For Determining Severability.

Petitioners contend that the court of appeals adopted a standard for determining severability which "contravenes long-standing precedent" and which "violates the constitutionally-required separation of powers." Brief for Petitioners 14, 17. Contrary to petitioners' contention, the court of appeals recognized and correctly applied the well-established standards for determining severability set forth by this Court in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

A. The Court Of Appeals' Severability Analysis Follows Long-Standing Precedent.

The standards for determining whether an unconstitutional statutory provision is severable from the remainder of a statute are well established. "The cardinal principal of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Regan v. Time*, ____ U.S. ____, 104 S. Ct. 3262, 3269, 82 L.Ed.2d 487, 497 (1984), quoting *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909).

In *Chadha*, this Court held that an unconstitutional legislative veto provision is to be severed " '[u]nless it is evident that

the Legislature would not have enacted those provisions which are within its power, independently of that which is not." ' 462 U.S. at 931-932, quoting *Buckley v. Valeo,* 424 U.S. 1, 108 (1976), and *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210, 234 (1932). In addition, following well-established principles governing severability, the Court held that an invalid legislative veto provision is "presumed severable if what remains after severance 'is fully operative as law." ' 462 U.S. at 934, quoting *Champlin Refining,* 286 U.S. at 234. These principles were recently reiterated by the Court in *Regan v. Time, supra.* There the Court held that the question of "[w]hether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." 104 S. Ct. at 3269, 82 L.Ed.2d at 492.[1]

Petitioners concede, as they must, that the court of appeals recognized long-standing precedent governing the severability of invalid statutory provisions. *See* Brief for Petitioners 15. Indeed, at the outset of its discussion of severability, the court declared:

> Since it is, of course, a veto provision whose severability is in question, the severability analysis set forth in *Chadha* itself is particularly instructive for us.

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[1] Ironically, in support of their contention that the court of appeals' severability analysis contravenes long-standing precedent, petitioners have attempted to shift the burden of proof by subtly misstating the well-established standard for determining severability. *See* Brief for Petitioners 14-15. Under this Court's decision in *Chadha, an unconstitutional legislative veto provision is to be severed unless it is evident* that Congress would not have enacted the statute without the legislative veto. 462 U.S. at 931-932. In contrast, under the standard formulated by Petitioners, *the entire statute must fall if it appears* that Congress would not have enacted the statute without the legislative veto. Brief for Petitioners 15. This standard improperly shifts the burden to those seeking to preserve the statute by requiring them to demonstrate that Congress would have enacted the statute without the veto.

Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550, 1559 (D.C. Cir. 1985) (Pet. App. 15a-16a). After quoting the principles of severability set forth in *Chadha*, the court of appeals again stated that "the analytical framework enunicated by *Chadha* applies to the severability issue which we are called upon to resolve." *Id.* (Pet. App. 16a-17a).

As the court of appeals observed, "*Chadha* presumes severability of the offensive provision if what remains after severance is fully operable as law." *Id.* at 1560 (Pet. App. 17a). The party arguing against severability must "demonstrate that Congress would not have enacted the provision without the severed portion." *Id.* (Pet. App. 17a). In view of this presumption, "severance lies unless it is 'evident' that what remains would not have been enacted." *Id.* (Pet. App. 17a-18a) (footnote omitted). Recognizing that statutory provisions are to be preserved whenever possible, the court of appeals framed the central question presented by this appeal as follows:

> Our charge is to save as much of the statute as we can consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall.
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> * * * *
>
> That is, "the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all."

Id. (Pet. App. 18a) (footnote omitted; brackets in original), quoting *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), *cert. denied*, ____U.S.____, 105 S. Ct. 173, 83 L.Ed.2d 108 (1984).

The court of appeals scrutunized the legislative history of the Airline Deregulation Act in order to determine whether the unconstitutional legislative veto provision in Subsection (f)(3)

should be severed from the remainder of Section 43. Based upon its careful analysis of the legislative history of the Act, the court concluded:

> [T]he evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan.

Id. at 1561 (Pet. App. 19a). Both the Senate and the House bills included employee protection programs, and these provisions were viewed an an important feature of the proposed legislation. *See* S. Rep. 95-631, 95th Cong., 2d Sess. 113-114 (1978); H. Rep. 95-1211, 95th Cong., 2d Sess. 26 (1978). The court properly rejected petitioners' reliance on selected comments from the legislative history expressing uncertainty about the need for employee protection.

> These comments . . . do nothing to counter the evidence that Congress placed great importance on the existence of the employee protection plan as an integral part of a comprehensive deregulatory regime.

766 F.2d at 1562 (Pet. App. 23a). The court of appeals likewise rejected petitioners' reliance on a solitary comment by then-Representative Elliott Levitas of Georgia expressing approval of the legislative veto provision. "[T]his sole source [is] a thin reed for eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees . . . ." *Id.* at 1563.

The court of appeals also considered, and found unpersuasive, "various items of circumstantial evidence" upon which petitioners relied to support their contention that the legislative veto provision was inseverable from the remainder of the statute. *Id.* (Pet. App. 24a). The court found it hardly surprising that only Section 43 of the Act contained a legislative veto provision. Section 43 was, for lack of a better term, the only regulatory provision in a deregulatory statute. As such, it was a "likely candidate for inclusion of a legislative veto device." *Id.* (Pet. App. 25a). In addition, the court of appeals

rejected the argument that the legislative veto was inseverable because the statute contained a unique combination of features, in addition to the legislative veto, which provided both a time limit for the promulgation of implementing regulations and a report and wait provision. As the court properly concluded, this circumstantial evidence failed to establish that Congress would have declined to enact an employee protection program without a legislative veto provision. *Id.* at 1563-1564 (Pet. App. 26a).

Finally, the court of appeals rejected petitioners' contention that the House agreed to accept the Senate's "novel" employee protection plan only with a significantly strengthened legislative veto provision. *Id.* at 1564-1665 (Pet. App. 26a-28a). The Conference Committee adopted the Senate's employee protection plan, which contained a legislative veto provision, and added a report and wait provision. Conference Report, H. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978). However, the Senate bill was perceived, at least by several Representatives, as providing less protection for airline employees than the House bill. *See, e.g.,* 124 Cong. Rec. 38, 522 (1978) (statement of Rep. Anderson); 124 Cong. Rec. 38, 524 (1978) (statement of Rep. Mineta). The court of appeals "found no evidence that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." 766 F.2d at 1565 (Pet. App. 27a-28a). Indeed, the court considered it unlikely that "a program offering less protection would have occasioned a call for even greater legislative control . . . ." *Id.* (Pet. App. 28a). *Cf. American Federation of Government Employees v. Pierce,* 697 F.2d 303 (D.C. Cir. 1980) (the legislative veto provision played a "critical role" in the compromise which emerged from the Conference Committee). Thus, the court of appeals found no indication in the legislative history that Congress would have declined to enact an employee protection program without a legislative veto provision.

> We fail to find satisfied here the exacting inseverability standard that it be "evident" that Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision. Ample evidence persuades us

> that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

Id. (Pet. App. 28a).

The separate opinion of Judge Ginsburg, concurring in the judgment, further demonstrates that the court of appeals adhered to the severability standards set forth in *Chadha*. In Judge Ginsburg's view, this case presented only one genuine issue: "would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions." *Id.* (Pet. App. 29a). In full agreement with the court's judgment, Judge Ginsburg concluded:

> Deletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress. A declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will.

Id., citing *Buckley v. Valeo*, 424 U.S. at 108-109.

Petitioners nevertheless argue that the court of appeals abandoned the severability standards enunciated by this Court and embraced "a radically different standard" for determining severability. Brief for Petitioners 15. This argument is premised principally upon the court of appeals' statement that petitioners had the burden of showing "'that Congress would have preferred no airline employee protection plan at all to the existing provision *sans* the veto provision.'" Brief for Petitioners 15-16, quoting 766 F.2d at 1561 (Pet. App. 19a). Contrary to petitioners' contention, this statement does not constitute a departure from well-established standards for determining severability.

Relying in part upon *Gulf Oil Corp. v. Dyke, supra*, the court of appeals posed the question presented by this case as "'whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute [] at all.'" 766 F.2d at 1560 (Pet. App. 18a), quoting *Gulf Oil*

Corp., 734 F.2d at 804. There is no indication that the court of appeals intended this to be a departure from the well-established standards of severability set forth in *Chadha*. On the contrary, as the court of appeals repeatedly explained, an invalid statutory provision is to be severed from the remainder of the statute "unless it is 'evident' that what remains would not have been enacted.'" 766 F.2d at 1560 (Pet. App. 18a). *See also id.* at 1560 (Pet. App. 17a) (" the party arguing against severability [must] demonstrate that Congress would not have enacted the provision without the severed portion"); *id.* at 1561 (Pet. App. 19a) ("the airlines must show . . . that it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear'); *id.* at 1561 (Pet. App. 19a) ("the evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan").

Moreover, this statement accurately describes the issue presented in a severability case. A court which is confronted with the question of whether an unconstitutional statutory provision can be severed from the remainder of statute has only two alternatives: (1) it may sever the invalid statutory provision from the remainder of the statute, leaving the valid portion of the statute in effect, or (2) it may strike down the statute in its entirety. Based upon a review of the legislative history, the court must determine whether Congress would have preferred the remainder of the statute, without the legislative veto, to no statute at all. In this case, following a careful analysis of the legislative history, the court of appeals found that petitioners had failed to demonstrate that it was evident that Congress would have preferred no employee protection program at all. 766 F.2d at 1565 (Pet. App. 28a). This analysis neither ignored the dominant intent of Congress nor allowed the court to reformulate the statute to create a new law not contemplated by Congress.

In sum, the court of appeals recognized and properly applied the standards for determining severability set forth by

this Court in *Chadha,* and it correctly concluded that the unconstitutional legislative veto provision was severable from the remainder of the statute.

B. The Well-Established Severability Standards Applied By The Court Of Appeals In This Case Do Not Violate The Constitutional Doctrine Of Separation Of Powers

Petitioners advance a host of arguments in support of their contention that the "new" severability standard allegedly formulated by the court of appeals usurps the legislative function of Congress. None of petitioners' arguments has merit.

Relying on *TVA v. Hill,* 437 U.S. 153, 194-195 (1978), petitioners assert that "[o]nce a court has performed its singular duty of determining whether a particular statute contravenes the Constitution, it should stop." Brief for Petitioners 17-18. In *TVA v. Hill,* notwithstanding the near completion of the multimillion-dollar Tellico Dam, this Court held that completion of the dam would violate the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.* The Court rejected arguments that the dam should be completed regardless of the Act's provisions, noting that the Court's function is not to view the Act "reasonably" or to shape a remedy "that accords with some modicum of common sense and the public weal." 437 U.S. at 194.

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.
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> * * * *
>
> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal."

Id. at 194-195.

The Court's decision in *TVA v. Hill* plainly offers no support for petitioners' argument that the court of appeals usurped the legislative function of Congress in this case. The Court examined the legislative history of the Endangered Species Act, and the result it reached was "in accord with congressional intent." *Id.* at 184, n.29. As the Court's analysis of the Act's legislative history made clear, "the result we reach today is wholly in accord with both the words of the statute and the intent of Congress." *Id.* at 184. Similarly, in this case the court of appeals, applying well-established standards for determining the severability of an unconstitutional legislative veto provision, properly sought to ascertain the dominant intent of Congress in determining whether the legislative veto provision should be severed from the remainder of the statute.

Petitioners next contend that "the responsibility for remedial legislative action should be left where it belongs—with the legislature." Brief for Petitioners 18. According to petitioners, if Congress wished to reinstate the statute, it was free to do so. *Id.* This argument is premised, at least in part, on indicia that "congressional preference would have been for a law other than that which would remain after severance . . . ." *Id.* However, there is no indication of any such preference in this case. As the court of appeals correctly concluded, "the evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out . . . ." 766 F.2d at 1561 (Pet. App. 19a). Moreover, as petitioners themselves readily admit, this approach would require Congress to reconsider legislation which it has already enacted. *Id.* 18, n.18. Although petitioners deem this to be an acceptable burden for Congress to bear, there are nearly 200 statutory provisions containing legislative vetoes, and it is unreasonable to assume that Congress would be willing, or able, to assume responsibility for such a mammoth undertaking. *See Chadha,* 462 U.S. at 967 (White, J. dissenting).

Furthermore, Congress had an opportunity in this instance to take remedial legislative action, but chose not to do so.

Subsection 43(f)(3) provides that the Secretary shall not issue as final any rules or regulations concerning the employee protection program until 30 legislative days after their submission to the appropriate committees of Congress. 49 U.S.C. app. § 1552(f)(3). This "report and wait" requirement gives Congress an opportunity to review proposed regulations before they become effective and to pass legislation barring their effectiveness if the regulations are deemed objectionable. *See Chadha,* 462 U.S. at 935 n.9; *Sibbach v. Wilson,* 312 U.S. 1, 1415 (1941). Final regulations implementing the first right of hire provisions of Section 43(d) were submitted for review as required by the Act on November 18, 1983, and Congress took no remedial action. *See* 129 Cong. Rec. H10578 (daily ed. Nov. 18, 1983). If the employee protection program as implemented by the Secretary was objectionable, Congress would surely have passed some form of remedial legislation, thereby ensuring that the program was in compliance with congressional intent.

Petitioners also contend that the "court's intrusion into the legislative sphere was prompted by its eagerness to identify presumptions that would negate the need for probing assessment of legislative intent." Brief for Petitioners 21. In *Chadha* this Court specifically recognized that a statutory provision is "presumed severable if what remains after severance 'is fully operative as a law,' " and the Court found the legislative veto provision severable, in part, because the remainder of the statute "survive[d] as a workable administrative mechanism without the one-House veto." 462 U.S. at 935, quoting *Champlin Refining,* 286 U.S. at 234. Thus, as the court of appeals in this case recognized, "*Chadha* presumes severability of the offensive provision if what remains after severance is fully operable as law." 766 F.2d at 1560 (Pet. App. 17a). The court's adherence to that standard clearly does not trigger an "insurmountable severability standard" which obviates the need to ascertain whether Congress would have been satisfied with the remainder of the statute. *See* Brief for Petitioners 22.

Petitioners' argument that "the *Chadha* 'operability' presumption" is either wholly inapplicable to this case or is applicable only after legislative intent favoring severability has

been determined, is without merit. *See* Brief for Petitioners 22-23. The fact that a statute survives as a workable mechanism after severance of the invalid statutory provision is an obvious and important factor to be considered in determining whether "the legislature would have been satisfied with what remainded . . . ." *Champlin Refining,* 286 U.S. at 235. Moreover, the absence of a severability clause does not diminish the fact that what remains after severance is fully operable as law.[2]

Furthermore, unlike many other statutes containing an unconstitutional legislative veto provision, the statute in this case provides an eleborate congressional review procedure that allows congressional oversight in the absence of the legislative veto device. Section 43(f)(3), which authorizes the Secretary of Labor to issue regulations to effectuate the program, requires that such regulations be submitted to the House and Senate aviation oversight committees for review. 49 U.S.C. app. § 1552(f)(3). In addition, the financial assistance provisions of the program are "subject to such amounts as are provided in appropriation Acts . . . ." 49 U.S.C. app. § 1552(b),(c) (To date, the financial assistance provisions have not been funded by Congress). Thus, the statute provides a workable mechanism allowing congressional oversight of the employee protection program even in the absence of the legislative veto provision.

Petitioners advance two final arguments which merit only brief comment. Their assertion that there is a presumption of inseverability in this case is specious. *See* Petitioners' Brief 24, n.27. The authorities upon which petitioners rely do not establish that there is a recognized presumption of inseverability. *See Chadha,* 462 U.S. at 1014 (Rehnquist, J. dissenting); *McCorkle v. United States,* 559 F.2d 1258, 1261

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[2] It is unclear whether the severability clause in the Federal Aviation Act, 49 U.S.C. app. § 1301, is applicable to Section 43. 766 F.2d at 1560, n.7 (Pet. App. 16a, n.7). As a consequence, the court of appeals declined to "read any legislative intent into the absence of an additional severability clause specifically encompassing section 43." *Id.* In any event, the "ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson,* 390 U.S. 570, 585 n.27 (1968).

(4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). Even if there were, a presumption of inseverability has absolutely no application to this case.

Although petitioners apparently concede that the court of appeals had a duty "to save as much of the statute as [it] can," they nevertheless assert that the court of appeals' anaylsis contorts the statutory rules of construction by "preferring presumption formulas to a genuine search for legislative intent." *See* Brief for Petitioners 22, n.23, quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). However, as an examination of the court of appeals' decision discloses, the Court recognized and correctly applied established severability standards in determining that the legislative veto provision in Subsection (f)(3) was severable from the remainder of Section 43.

III. The Court Of Appeals Considered And Properly Weighed Evidence Of Congressional Intent.

Petitioners contend that the court of appeals concluded that the legislative veto provision in Subsection (f)(3) is severable from the remainder of Section 43 because it "wrongly disregarded dispositive evidence demonstrating inseverability." Brief for Petitioners 26. Purporting to apply "[t]he proper, traditional analysis of legislative intent," petitioners assert that the legislative veto provision is inseverable because Congress "would not have enacted the employee protection program in its current form without including the veto provision as an essential check on DOL's development of the program." *Id.* at 27-28.

However, as even a casual reading of the decision below discloses, the court of appeals carefully considered, and rejected, petitioners' arguments that Congress would have enacted a different employee protection program in the absence of the legislative veto provision. Moreover, the court of appeals did not disregard evidence allegedly supporting petitioners' contention that the legislative veto provision was inseverable from the remainder of the statute. On the contrary, based upon an examination of the Act and the legislative history, the court was persuaded that it was far from evident that Congress would not have enacted the employee protection program in the absence of the legislative veto.

A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Provision Is Severable From The Remainder Of The Statute.

Each of the arguments on which petitioners rely to support their contention that the legislative veto provision is inseverable were carefully weighed and soundly rejected by the court of appeals. *See* 766 F.2d at 1560, 1563-1564 (Pet. App. 18a-19a, 24a-26a). Thus, petitioners cannot legitimately claim that the "evidence" upon which they now rely was disregarded by the court. Moreover, as the language and structure of the statute make clear, the legislative veto provision was not so essential to the employee protection plan that it is inseverable from the remainder of the statute.

The employment protection program provides a comprehensive program of protection for employees of certificated airlines dislocated by deregulation. In order to be eligible for protection, an airline employee must have been employed by a certificated air carrier for at least four years at the time the Airline Deregulation Act was enacted. 49 U.S.C. app. § 1552(h)(1). Moreover, a "qualifying dislocation" must be the result of a bankruptcy or major contraction which occurs within ten years of the enactment of the Deregulation Act and which is in major part caused by the change in regulatory structure brought about by the Act. 49 U.S.C. app. § 1552(h)(2). The term "major contraction" is defined as "a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period." 49 U.S.C. app. § 1552(h)(4).

Subject to such amounts as are appropriated by Congress, Subsection 43(b) provides for monthly assistance payments for a maximum of three years to airline employees who have been deprived of employment or have suffered a reduction in wages as a result of deregulation. 49 U.S.C. app. § 1552 (a), (b). Under Subsection 43(b), a protected employee receives monthly assistance payments in an amount computed by the Secretary of Labor who, after consultation with the Secretary of Transportation, "*shall*, by rule promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of

protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees." 49 U.S.C. app. § 1552(b) (emphasis added). Subsection 43(c) provides for relocation assistance payments to reimburse employees forced to relocate in order to obtain other employment. 49 U.S.C. app. § 1552(a), (c). Under Subsection 43(c), eligible protected employees forced to relocate receive assistance payments in amounts "as determined by the Secretary." 49 U.S.C. app. § 1552(c).

Subsection 43(d) provides that a protected employee who is furloughed or terminated, other than for cause, during the ten year period following enactment of the Deregulation Act has a right of first hire by any other certificated air carrier hiring additional employees. 49 U.S.C. app. § 1552(d).[3] An air carrier which held a certificate at the time the Deregulation Act was enacted has a corresponding duty to hire protected employees. *Id.*

Under Subsection 43(f)(1) the Secretary of Labor is authorized to "issue, amend, and repeal such rules and regulations as may be necessary for the administration of [the employee protection program]." 49 U.S.C. app. § 1552(f)(1). Section 43(f)(3) provides that the Secretary shall not issue any rule or regulation concerning the employee protection program as final until thirty legislative days after it has been submitted to the Senate Committee on Commerce, Science, and Transportation and to the House Committee on Public Works and Transportation. 49 U.S.C. app. § 1552(f)(3). Section 43(f)(3) also provides that any final rule or regulation issued by the Secretary shall become effective sixty legislative days after its submission to Congress unless during that period either House adopts a resolution disapproving the rule or regulation. 49 U.S.C. app. § 1552(f)(3). This provision is, of course, a one-House legislative veto, which was declared unconstitutional by this Court in *Chadha*.

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[3] The right-to-first-hire provisions of the Act are similar to protections which Congress provided for dislocated railroad employees in the Milwaukee Railroad Restructing Act, 45 U.S.C. § 907, the Rock Island Transition and Employee Assistant Act, 45 U.S.C. § 1004, and the Northeast Rail Service Act of 1981, 45 U.S.C. § 797(b).

Section 43's employee protection provisions are fully operative without the legislative veto. Indeed, section 43(d) states, without any reference to implementing regulations, that "[e]ach air carrier hiring additional employees shall have a duty to hire such a [protected employee] before they hire any other person . . . ." 49 U.S.C. app. § 1552(d). Neither an employee's first right of hire nor a carrier's statutory duty to hire a protected employee, is dependent upon the issuance of regulations implementing the employee protection program. *See McDonald v. Piedmont Aviation,* 625 F.Supp. 762 (S.D.N.Y. 1986) ("the adoption of regulations is hardly necessary to the enforcement of Section 43").

In addition, although Subsection 43(b) requires the Secretary to issue rules and regulations implementing the financial assistance provisions of the statute, Section 43(f)(1) simply provides that "[t]he Secretary *may* issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section." 49 U.S.C. app. § 1552(f)(1) (emphasis added). Accordingly, the Secretary is under no obligation to promulgate regulations implementing the statute's first right to hire provisions, which, if issued, would be subject to the legislative veto provision in Subsection 43(f)(3).

Thus, it is far from "evident" that Congress would have refused to enact the employee protection program without the legislative veto. On the contrary, the language and structure of the statute demonstrate that Congress did not regard the legislative veto provision to be so critical to the statute's hiring preference provisions as to be inseverable from the remainder of the statute.

B. The Legislative History Demonstrates That The Legislative Veto Provision Is Severable From The Remainder Of The Statute.

In enacting the Airline Deregulation Act, Congress was aware that the new regulatory scheme might have severe and extensive adverse effects on the industry's labor force. Indeed, the legislative history establishes beyond doubt that Congress considered the employee protection provisions in Section 43 to be of the utmost importance, and it strongly reinforces the court

of appeals' conclusion that the legislative veto provision is severable from the remainder of the statute.

The House and Senate bills which led to the Deregulation Act each contained provisions for the protection of employees, and concern that airline employees be guaranteed a measure of protection from the adverse effects of deregulation was repeatedly expressed by both Houses of Congress. Congress was particularly concerned about the adverse effects of deregulation upon experienced airline employees who had devoted their carriers to an industry which, after forty years of protective government regulation, was about to undergo dramatic change. *See* S. Rep. No. 631, 95th Cong., 2d Sess. 113-114 (1978); H. Rep. No. 1211, 95th Cong., 2d Sess. 26 (1978). The importance of the employee protection provisions in Section 43 is reflected in the following excerpts from the Senate Report:

> The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. The Committee felt that this concern should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.
>
> * * *
>
> Airline employees have relied on the present regulatory system through their reliance on the conditions which have resulted from that system. They have relied directly in their decision to enter the industry and indirectly through their acceptance of compensation and work rules which have been negotiated within the context of the regulatory system and the job security it was thought to offer.
>
> * * *

> The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong., 2d Sess. 113-114. In contrast, the legislative history contains only a single reference to the legislative veto provision, which states that Congress favored oversight of only the monthly assistance payments, and not the remaining employee protection provisions. *Id.* at 116.

The floor debate on the conference committee compromise reinforces the argument that the legislative veto provision is severable from the remainder of Section 43. When Senator Cannon introduced the bill, he did not even mention that it contained a legislative veto provision. 124 Cong. Rec. 5851 (daily ed. April 17, 1979). There was no reference at all to the legislative veto in the ensuing Senate debate. *Id.* at 5849-5885. Moreover, as the Senate debates on the Conference Report demonstrate, there was widespread support for the employee protection program. 124 Cong. Rec. 37416-37421 (daily ed. October 14, 1978). There was wide-spread support for the program during the House debate as well. *Id.* at 38521-38525. Indeed, Congressman Levitas was the only member of the House even to address the legislative veto provisions. *Id.* at 38524.

Thus, the legislative history makes it abundantly clear that passage of the employee protection program in its present form did not hinge upon inclusion of a legislative veto and that Congress would have enacted the program without the veto. Indeed, the legislative history strongly supports the conclusion that Congress would *not* have enacted the Deregulation Act itself in its present form *without* the employee protection program.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent intervenors respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM J. BIRNEY
(Counsel of Record)

WILLIAM G. MAHONEY
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Respondent Intervenors BRAC, FEIA, IAM and TWU

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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE RESPONDENT AIR LINE PILOTS ASSOCIATION

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119

*(Counsel of Record)

Of Counsel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
(Suite 204)
Washington, D.C. 20007

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552, contains labor protective provisions, which, *inter alia,* grant a hiring preference to certain furloughed or terminated airline employees. Section 43 also authorizes the Secretary of Labor to issue regulations to implement the preference, subject, however, to a legislative veto. Did the Court of Appeals correctly conclude that the concededly unconstitutional legislative veto provision was severable from the remainder of § 43 where it found "ample evidence that the employee protection program was deemed to be an important aspect" of the Airline Deregulation Act, but "not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan"?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
AUTHORITIES CITED	iv
COUNTERSTATEMENT OF THE CASE	2
I. The Senate Bill	2
A. The Senate's Deregulation Provisions	2
B. The Senate's Labor Protective Provisions	4
1. The Disagreements Over Concept	4
2. The Particulars of the Senate's Labor Protection Provision	7
II. The House Bill	12
A. The House's Deregulation Provisions	12
B. The House's Labor Protective Provisions	13
III. The Conference Committee and Subsequent Enactment	15
SUMMARY OF ARGUMENT	19
ARGUMENT	23
I. THERE IS NO PERSUASIVE BASIS FOR CONCLUDING THAT THE LEGISLATIVE VETO PROVISION WAS CRUCIAL IN ANY MATERIAL RESPECT TO THE ENACTMENT OF § 43	23
A. The Evidence to Support a Determination of Inseverability is Completely Lacking Here	23
B. Petitioners Are Mistaken in Asserting that the Veto Provision Resulted From Congressional Concern that Administration of § 43 Might Conflict With Airline Deregulation Objectives	27

C. Petitioners Do Not Otherwise Show that the Veto Provision Was Crucial to Enactment of First Right of Hire 35

II. THE COURT OF APPEALS APPLIED A PROPER TEST FOR DETERMINING SEVERABLITY 41

CONCLUSION 45

AUTHORITIES CITED

CASES: Page

Alaska Airlines, Inc., v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985) ..... *passim*

American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) 24,26,34,43

Buckley v. Valeo, 424 U.S. 1 (1976) 23,41,43

Champlin Refining Co. v. Corporation Comm'n 286 U.S. 210 (1932) 23, 41

City of New Haven v. United States, ___ F.Supp. ___ (No. 86-0455) (D.C. D.C. May 16, 1986) 26, 34

Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom., Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) 24, 26, 33

EEOC v. CBS, 743 F.2d 969 (2d Cir. 1984) 25, 34

EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984) 25, 34

Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S.Ct. 173 (1984) 34, 37, 41

Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983) 23, 36, 41

McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 26, 33

McDonald v. Piedmont Aviation, 625 F.Supp. 762 (S.D.N.Y. 1986) 29

Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984) 25

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 44

Regan v. Time, Inc., ___ U.S. ___, 104 S.Ct. 3262 (1984) 24, 41

Table of Authorities Continued

Page

Sibbach v. Wilson, 312 U.S. 1 (1941) 36

Tilton v. Richardson, 403 U.S. 672 (1971) 44

STATUTORY PROVISIONS AND REGULATIONS

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in various sections of 49 U.S.C. app. (1982)) ..... *passim*

§ 5 (92 Stat. 1709) 38

§ 7 (92 Stat. 1711) 39

§ 8 (92 Stat. 1712) 39

§ 12 (92 Stat. 1716) 37

§ 33 (92 Stat. 1732) 38, 39

§ 43 (92 Stat. 1750 (49 U.S.C. app. § 1552)) . *passim*

Budget and Impoundment Control Act of 1974, 2 U.S.C. § 681 26

Federal Aviation Act of 1958, § 401, 49 U.S.C. § 1371 37

Interstate Commerce Act, § 5(2)(f), 49 U.S.C. § 11347 ..... 14, 30

Rail Passenger Act, § 405, 45 U.S.C. § 565 ..... 14, 30

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 14

Reorganization Act of 1977, 5 U.S.C. §§ 901-912 ..... 25, 41

15 U.S.C. § 3417 41

29 U.S.C. § 1306 41

42 U.S.C. § 2159 41

42 U.S.C. §§ 8724-25 41

43 U.S.C. § 1337(a)(4) 41

50 App. U.S.C. § 2097 41

29 C.F.R. Part 220, 50 Fed. Reg. 53094-105 (Dec. 27, 1985) 29

Table of Authorities Continued

	Page
§ 220.21, 50 Fed. Reg. 53103	28
50 Fed. Reg. 53094-95	29
50 Fed. Reg. 53095	29
50 Fed. Reg. 53096	29
LEGISLATIVE AND EXECUTIVE MATERIALS	
H.R. 12611, 95th Cong., 2d Sess. (1978)	*passim*
H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978)	*passim*
H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. (1978)	*passim*
S. 2493, 95th Cong., 2d Sess. (1978)	*passim*
S. Rep. No. 631, 95th Cong., 2d Sess. (1978)	*passim*
124 Cong. Rec. 10674-75 (1978)	10
124 Cong. Rec. 10674-83 (1978)	7
124 Cong. Rec. 10675 (1978)	7
124 Cong. Rec. 10679 (1978)	7
124 Cong. Rec. 10680-81 (1978)	11
124 Cong. Rec. 10682 (1978)	7
124 Cong. Rec. 10683 (1978)	11
124 Cong. Rec. 10698 (1978)	2
124 Cong. Rec. 10701 (1978)	37
124 Cong. Rec. 30703 (1978)	15
124 Cong. Rec. 10710 (1978)	4
124 Cong. Rec. 30661-718 (1978)	15
124 Cong. Rec. 30703 (1978)	14
124 Cong. Rec. 30718 (1978)	14
124 Cong. Rec. 37416-21 (1978)	17
124 Cong. Rec. 38521-25 (1978)	17

Table of Authorities Continued

	Page
124 Cong. Rec. 38522 (1978)	17
124 Cong. Rec. 38523 (1978)	17
124 Cong. Rec. 38524 (1978)	19
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124 Cong. Rec. 38526-27 (1978)	17
MISCELLANEOUS	
Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 Hofstra L. Rev. 593, 611-12	32
1 Mezines, Stein & Gruff, *Administrative Law* §3.02	33

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---

BRIEF FOR THE RESPONDENT AIR LINE PILOTS ASSOCIATION

The Air Line Pilots Association, International ("ALPA") is a labor organization which is the bargaining agent for approximately 39,000 commercial airline pilots employed by 47 U.S. carriers. Because of the obvious interest of its members in the employee protection provision which was enacted for their benefit and which is at issue in this litigation, ALPA intervened as a defendant in the district court and was one of the appellants in the court of appeals.

COUNTERSTATEMENT OF THE CASE

ALPA accepts Petitioners' procedural history of this litigation. However, in their Statement of the Case, Petitioners give only cursory treatment to the legislative history of § 43, which has enabled them to characterize it misleadingly. (Pet. Br., pp. 2-5). Accordingly, we set forth below the pertinent facts concerning the passage of the Airline Deregulation Act in general, and of § 43 in particular.[1] These facts show with unusual clarity that Congress placed great importance on the labor protective provisions of the ADA, that it paid scant heed to the veto provision, and that it evinced no concern that implementation of § 43 could in any way undermine the objectives of airline deregulation.

I. The Senate Bill

A. The Senate's Deregulation Provisions

The Senate passed its version of the ADA—S. 2493—on April 19, 1978, about a month before the House Committee on Public Works and Transportation reported out its deregulation bill, H.R. 12611. 124 Cong. Rec. 10,698 (1978); H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978) (hereinafter "House Report"). The Report of the Senate Committee on Commerce, Science and Transportation which accompanied S. 2493 succinctly stated the bill's primary objective: "to provide the domestic air transportation industry with the same competitive incentives which face most other American industries." S. Rep. No. 631, 95th Cong., 2d Sess. 5 (1978) (hereinafter "Senate Report"). These competitive incentives did not exist in the airline industry, according to the Report, because the Civil Aeronautics Board ("CAB"), which was statutorily charged with issuing certificates of public convenience and necessity

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[1] The Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, is codified in various sections of 49 U.S.C. app. Section 43 of the ADA appears as 49 U.S.C. app. 1552.

without which an interstate air carrier could not operate, had developed and applied its certification policy in a manner which was "both substantively restrictive and administratively burdensome to new competitors." Senate Report, p. 3. Moreover, the "Board has pursued fare policies which restrict price competition at the public's expense." *Ibid.*

In legislating a response to the perceived problems, the Senate rejected a "broad discretionary approach" whereby Congress would simply "indicate its preference for increased competition in a general way, leaving the particular details of reform to the [Civil Aeronautics] Board." Senate Report, p. 4. Instead, it opted to "deprive the Board of some of its discretion" by changing existing law "in a variety of ways." *Id.* at pp. 4-5. A major objective of these specific changes was to "substantially increase . . . the ability of new carriers to enter the industry, and the ability of existing carriers to expand into new markets." *Id.* at p. 5.[2]

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[2] As summarized in the Senate Report, among the specific changes were the following:

> First, the public interest standard which the Board applies in route cases is rewritten to impose on the Board a duty to allow prices, route structures, and the nature and variety of air services to be set by the independent forces of the free market and airline management decisions, rather than the Board itself. Second, a new section provides specific procedural deadlines to which the Board must adhere. This provision will ensure that every route application receives expedited consideration. . . Third, there are two provisions which allow new entry without Board interference. The first is the Dormant Authority provision, which allows qualified new entrants to begin service in markets which have been abandoned by incumbent carriers. The second provision is Automatic Market Entry, which guarantees that every carrier will be granted at least one route each per year without seeking CAB approval of managements' market selection.
>
> [Senate Report, p. 5]

Another major objective was to "ensure price competition will be a permanent reality in domestic air transportation" by establishing a "zone of reasonableness." Senate Report, p. 5. Within that zone, the Board would be without power to suspend or reject fares; outside the zone, the Board could regulate fares, but had to evaluate them under the new pro-competition public interest standard. *Ibid.* The Board retained authority "to prevent anti-competitive fare strategies and prevent unjust discrimination." *Ibid.*

A stated concern regarding the proposed reforms was "that the movement to a more competitive airline system should be made without major disruptions to the industry or the traveling public." Accordingly, the Senate bill provided for "a gradual phase-in of the more competitive provisions over periods that var[ied] from one to ten years." Senate Report, p. 5.

B. The Senate's Labor Protective Provisions

1. The Disagreements Over Concept

As reported out of Committee and as approved largely unchanged by the full Senate, S. 2493 contained an airline employee protection program which was set forth in Section 22 of the bill. Two types of relief were to be available to eligible individuals: (1) monetary compensation for lost wages and benefits and for relocation expenses; and (2) a hiring preference within the industry, referred to as "first right of hire." Senate Report, pp. 46-49, 113-117; 124 Cong. Rec. 10,710 (1978).

The rationale for the protection program stated in the Committee report (Senate Report, pp. 113-114) was basically as follows:

- Although "regulatory reform . . . will increase the total number of jobs in the airline industry," it is nonetheless "a possibility . . . that one or more airlines will encounter such difficulties in adjusting that they will

lose enough traffic to cause a major reduction in their total labor force."

- Airline employees entered the industry and shaped their careers in reliance on a regulatory system which gave them a measure of job security.
- Whereas the carriers are given a transition period to adjust and should be able to adapt to phased-in deregulation, individual employees are not as versatile:

> . . . [A]n individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift, even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be able to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.
>
> . . . The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.
>
> [Senate Report, p. 114]

The Committee report took note of arguments of critics of the employee protection program that airline employees are no more deserving of special protection than others in private industry adversely affected by government action, and that the program would set a bad precedent for the future. Senate Report, pp. 114-115. The Committee responded, however, that in the airline industry there had been "justifiable reliance on the stability of the regulatory

structure" over a long period, that Congress was in part to blame for leaving an outdated framework in place for so long, and that, accordingly, "very special circumstances" existed which merited an attempt to minimize the dislocations caused by deregulation. As the Committee put it, "the particular features of the airline industry and the regulated environment in which it has existed since 1938 make a temporary transitional assistance program appropriate," but "[t]he appropriateness of such programs for future regulatory reform legislation must be examined on a case by case basis." Senate Report, p. 115.

During Committee deliberations, a member of the Committee, Senator Zorinsky, had sought to limit employee protection to first right of hire. However, the limiting amendment he offered was defeated by a vote of 8-6. Senate Report, p. 206. Accordingly, at the conclusion of the Senate Report, Senator Zorinsky submitted his "Additional Views" explaining his position. Senate Report, pp. 206-11. He supported giving furloughed or terminated airline employees a priority in the hiring process of other carriers in order "to take advantage of the ebb and flow of the free enterprise system." *Id.* at 206-7. Moreover, he stated that "there is precedent for protective provisions" which he found "analogous" to first right of hire. *Ibid.* However, he strongly objected to what he deemed the unprecedented monetary compensation to "also provide funds from the federal treasury, which could conceivably cost $1 billion. . ." *Id.* at 206. In this regard, he noted that "airline employees are some of the highest paid in the nation," and he "wonder[ed] if the general public is willing to support from its tax dollars a senior pilot at $100,000 a year, not to mention fringe benefits." *Ibid.*

When S. 2493 reached the Senate floor, disagreement over the concept of labor protection—whether there should be any protection program for airline employees, and, if so, the basic form it should take—surfaced again in the debate on the bill. Senator Hatch offered an amendment

to delete Section 22 (the labor protection section) in its entirety from the bill and substitute instead a declaration that "It is the policy of the United States not to approve employee protection programs." 124 Cong. Rec. 10,679, 10,682 (1978). Although Senator Hatch complained particularly about the financial assistance portion of Section 22, his basic objection was that "there should be no special or favored treatment accorded to workers in a special and privileged industry," and that "the employee protection provisions . . . set a bad example and precedent for a trend which is not right for anybody." *Ibid.* Senator Kennedy responded that the bill contains protections for "small communities . . . for the airlines and their shareholders . . . for just about every aspect of the airline industry. . .," and, hence, it would be "unfair and unwarranted" to eliminate "the limited provisions for the protection of employees" contained in the bill. 124 Cong. Rec. 10,682 (1978). Senator Hatch's amendment was resoundingly defeated, 85-7. *Ibid.*

Senator Zorinsky renewed his effort to delete the financial assistance component of the bill, stating that his substitute first right of hire amendment "is far more liberal in application than is the present bill's provision." 124 Cong. Rec. 10,675 (1978). The floor debate reflected essentially the same arguments as were made in the Committee over the wisdom of providing federal financial assistance to airline employees adversely affected by deregulation. And, as in Committee, Senator Zorinsky lost on the issue before the full Senate by a close vote: 48-43. 124 Cong. Rec. 10,674-83 (1978).

2. The Particulars Of The Senate's Labor Protection Provision

With respect to monetary compensation, S. 2493 authorized the Secretary of Labor to make monthly assistance payments or reimbursement payments to "eligible protected employee[s]." (§ 22(a)) However, the bill set forth

in considerable detail the manner in which the Secretary was to exercise that authority:

- A "protected employee" was defined as "a person who, on the date of enactment of this section, has been employed for at least 4 years by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act of 1958." (§ 22(h)(1))

- An "eligible employee" was defined as a "protected employee" who either "has been deprived of employment, or . . . has been adversely affected with respect to his compensation, on account of a qualifying dislocation." (§ 22(a))

- A "qualifying dislocation" was defined as "a bankruptcy or major contraction" of a certificated air carrier occurring within ten years after the date of the Act and resulting from the change in regulatory structure as determined by the CAB. (§ 22(h)(2))

- A "major contraction" was, in turn, defined as a reduction of at least 15 percent of a carrier's full-time employees (excluding strikers) which either had occurred, or was likely to occur, within a 12-month period (§ 22(h)(4))

- Although the Secretary of Labor was given discretion to determine the amount of monthly assistance payments, including "what percentage of salary such payment shall constitute for each applicable class or craft of employees," he was required to consult in this regard with the Secretary of Transportation, to deduct unemployment compensation, and to make further specified reductions if an individual refused to accept reasonably comparable employment even if that meant relocating. (§ 22(b))

- There was a limit of 36 on the number of monthly payments an employee could receive. (§ 22(g)(2))

- "Eligible protected" employees were entitled to receive "relocation assistance," defined as "reasonable moving expenses (as determined by the Secretary [of Labor])" incurred in obtaining new employment, as well as "reimbursement payments for any loss resulting from selling . . . [the employee's] principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence." (§ 22(c))

S. 2493 was even more precise in spelling out first right of hire.

- A "protected" employee who is furloughed or otherwise terminated by a carrier regulated by the CAB "shall have first right of hire, in order of seniority and regardless of age, in his occupational specialty, by any other air carrier which held a certificate issued under section 401 of the Federal Aviation Act of 1958 prior to the effective date of this section." (§ 22(d)(1))

- The hiring preference was available only if the termination or furlough was the result of "a qualifying dislocation." *Ibid.*

- The hiring carrier was entitled to hire its own furloughed employees before extending the preference to others. *Ibid.*

- An individual who obtained a job at another carrier through first right of hire retained seniority and recall rights at the carrier which furloughed or terminated him. *Ibid.*

- The Secretary of Labor was instructed to prepare and publish a list of jobs available with certificated carriers, and to "make every effort to assist an eligible protected employee in finding other employ-

ment." The Secretary was also authorized to require carriers to submit relevant reports, data, and other information. (§ 22(d)(2))

In addition to the mandatory duties imposed on the Secretary of Labor—primarily determining monetary compensation levels and establishing a job list—Section 22 provided that "[t]he Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section." (§ 22(f)(1)) Subsection 22(f)(2) then provided that the rules and regulations proposed by the Secretary had to be submitted to Congress 60 legislative days before they were to take effect, during which period they could be disapproved by a resolution of either House.

On the Senate floor, there were several attempts to amend Section 22. The Hatch and Zorinsky amendments which dealt with the basic concept and form of labor protection have previously been described. *Supra,* pp. 6-7. The Zorinsky amendment, aside from its primary objective of seeking to delete the financial assistance component of Section 22, sought as well to change some of the particulars of first right of hire so as to make it more favorable to employees. Thus, the amendment would have defined a "protected" employee as a person with only one year of airline employment, instead of four years, and would have defined "a qualifying dislocation" as any reduction in a carrier's workforce instead of a minimum 15% reduction. Senator Zorinsky's stated purpose was to further strengthen the hiring preference as a better alternative to "affording the relief of compensation from the pockets of the Nation's taxpayers." 124 Cong. Rec. 10,674-75 (1978). Senator Danforth, on the other hand, offered an amendment that would have enhanced the financial assistance component by extending the three year limit on monthly payments to up to five years and by eliminating the "15% trigger" for both monetary compensation and first right

of hire. As with the Zorinsky amendment, the Danforth amendment did not pass; the vote was 54-37 against. 124 Cong Rec. 10,680-81 (1978).

Senator Cannon, one of the primary sponsors of S. 2493, offered an amendment which did pass: deleting language which would have required the Secretary of Labor "to insure that the protected employee will not, during the period in which he is entitled to protection, be placed in a substantially worse financial position with respect to wages and fringe benefits." 124 Cong. Rec. 10,683 (1978). The stated purpose of this amendment was to make certain that the Secretary would not be legally bound to guarantee the full salary and benefits of very highly paid employees, but rather would have "discretion concerning the level of payments" in view of his "expertise and experience in providing adjustment assistance to workers." *Ibid.*

There was no discussion on the floor of the Senate concerning the legislative veto, nor was it even mentioned. The Committee report refers to the veto once, as follows:

> Eligible employees who lost their jobs would be entitled to monthly payments for a maximum of 3 years or until they were reemployed, whichever occurred first. The amount of such payment would be equal to a percentage of former wages, as determined by regulations promulgated by the Department of Labor. *These regulations will be subject to congressional review.* The committee considered setting statutory percentage figures and maximum dollar amounts, but concluded that the Secretary of Labor, after consultation with the Secretary of Transportation, will be in a better position to determine the appropriate amounts. The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax

> income in order to preserve maximum incentives for employees to secure comparable work.
>
> [Senate Report, pp. 116-117 (emphasis added)]

II. The House Bill

A. The House's Deregulation Provisions

The House bill, H.R. 12611, was reported out by the House Committee on Public Works and Transportation on May 19, 1978. The Committee pointed out that there was considerable dissatisfaction with the existing airline regulatory system, which had been established in 1938 and had not been substantially changed since. House Report, p. 1. The sources of that dissatisfaction, in the Committee's view, were largely the same as those identified in the report of its Senate counterpart (*supra*, p. 3): the CAB, particularly prior to 1975, tended to discourage competition in the industry "by denying or dismissing most applications for new routes, by refusing to allow new carriers to enter the trunkline industry, . . . by discouraging experiments with reduced fares . . . [,]" and by utilizing hearing procedures which "led to extensive inaction, delay, and red tape." House Report, p. 2.

The legislation recommended by the House Committee was conceptually similar to that passed by the Senate in that it, too, opted for targeted reform in specific ways—a "release of some regulatory fetters"—as opposed to giving the CAB discretionary authority to implement "total deregulation." House Report, p. 4. As the Committee report described the proposed legislation, "H.R. 12611 is a moderate reform bill which introduces more competition and less regulation of the airline industry on a gradual, controlled basis." *Ibid.* Like the Senate bill, the House bill

> . . . includes a revised policy statement requiring the Board to stress competition and to encourage low fare service and new entry into the industry. The bill also includes a fare flexibility provision

> permitting airlines to raise and lower fares by specified percentages without CAB approval. The bill also imposes procedural deadlines for CAB decisions and allows CAB to develop simplified procedures for less controversial cases.
>
> [House Report, p. 5]

Also like the Senate bill, the House bill contained provisions allowing easy access by other carriers into markets in which carriers certified to provide services were not doing so ("dormant authority") and establishing an "experimental automatic entry program under which all CAB certificated carriers will be permitted automatic entry into one market of their choice in the first calendar year after enactment." Thereafter, the CAB would report on the program, and Congress would decide whether to continue it on a more permanent basis. House Report, p. 5.

B. The House's Labor Protective Provision

Section 32 of H.R. 12611 protected airline employees from the potential effects of deregulation in a way which was far more encompassing than the more specific protection afforded by the Senate bill. For, under the House bill, no new carrier authority could be exercised at all if affected employees were thereby placed in a substantially worse position. The Secretary of Labor was charged in this regard with adhering to a minimum protection standard, but no statutory maximum was set. Thus, Section 32 provided that:

> No authority granted by this Act, or by any amendment made by this Act, shall be exercised by any carrier unless prior to each such exercise, the Secretary of Labor has certified to the Civil Aeronautics Board that the interests of the employees who may be affected thereby have been adequately protected by fair and equitable arrangements providing levels of protection no less beneficial to and protective of such interests than

> those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Act, as such sections are in existence on the date of enactment of this section or are hereafter amended, except that the carrier-employer of the affected employees shall be responsible for the application of the protective arrangements to such employees and shall be reimbursed by the Secretary of the Treasury for the cost of such application. There is hereby established in the Treasury of the United States a separate account to be known as the "Airlines Employees' Protective Account" . . . to make reimbursements pursuant to this section.
>
> [124 Cong. Rec. 30,703, 30,718 (1978); House Report, p. 22]

Section 5(2)(f) of the Interstate Commerce Act, which was then codified as 49 U.S.C. § 5(2)(f) and subsequently recodified as 49 U.S.C. § 11347, provided *inter alia* that affected employees of the carriers involved will not be in a worse position with respect to their employment for at least four years, and that the protective arrangements be at least as favorable to the employees as were ordinarily required prior to February 5, 1976.[3] Section 405 of the Rail Passenger Act, 45 U.S.C. § 565, mandated "fair and equitable arrangements to protect the interests of employees," which

> . . . shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (in-

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[3] February 5, 1976 was the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976. Pub. L. 94-210, 90 Stat. 31. Section 402 of that Act, 90 Stat. 62, amended Section 5(2)(f) of the Interstate Commerce Act to require the ICC to impose arrangements no less protective of the interests of employees "than those heretofore imposed pursuant to this subdivision. . ."

> cluding continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs.

The House Committee report briefly summarized the gist of the House bill's employee protection provision, but otherwise did not discuss it. House Report, p. 22. The report did, however, list the employee protection program as among the "important provisions of H.R. 12611." *Id.* at p. 5.

H.R. 12611 was considered and passed by the full House on September 21, 1978. 124 Cong. Rec. 30,661-718 (1978). The labor protective provision, as reported out by the Committee, was adopted without apparent controversy or discussion. *Id.* at 30,703. The provision contained no legislative veto language, and none was proposed or even mentioned on the House floor.

III. The Conference Committee And Subsequent Enactment

As stated in the Conference Report, the employee protection provision that emerged from the House-Senate Conference Committee and was ultimately enacted as § 43 of the ADA "[i]s basically the same as the Senate bill." H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 105 (1978) (hereinafter "Conf. Rep."). However, under pressure from the House conferees, the protection provision was liberalized in several respects. Perhaps most important, the "qualifying dislocation" requirement was dropped for first right of hire, though it remained as a condition for financial assistance. Conf. Rep., pp. 48-51, 105-106. Thus, in

order to obtain the hiring preference granted by § 43, a "protected" employee would not have to meet the heavy burden of showing that his termination or furlough was the result of a "bankruptcy or major contraction . . . the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act . . . as determined by the Civil Aeronautics Board." § 43(h)(2) (definition of "qualifying dislocation"). On the other hand, language was added making clear that employees furloughed or terminated "for cause" were ineligible for the hiring preference. Conf. Rep., p. 105; § 43(d)(1). The requirement that employees entitled to the preference be hired in order of seniority was deleted, but the "regardless of age" language was retained. *Ibid.*

Financial assistance was made somewhat easier to obtain because a "major contraction"—one of the elements of a "qualifying dislocation"—was redefined as a work force reduction of at least $7^1/_2$ percent, rather than 15 percent. Conf. Rep., p. 105; § 43(h)(4). Also, the limit on the number of monthly assistance payments was increased from 36 to 72. Conf. Rep., p. 105; § 43(e)(1). However, the words "subject to such amounts as are provided in appropriation Acts" were inserted in subsections (b)(1) and (c) of § 43, thus removing any possible doubt that all monetary compensation authorized by the provision was contingent on future appropriations.

With regard to both the guidelines for financial assistance which the Secretary of Labor was directed to issue and such other rules and regulations "as may be necessary" for the program, the Secretary was placed under a time constraint: they were to "be promulgated within six months after the date of enactment of this section." § 43(f)(2); Conf. Rep., p. 105. Moreover, a "report and wait" requirement was added to the one-house legislative veto provision: *i.e.*, thirty days prior to issuance, the Secretary was obligated to submit any final rule or regulation to the Senate Commerce, Science and Transportation Com-

mittee and to the House Public Works and Transportation Committee. § 43(f)(3); Conf. Rep., p. 106.

The Conference Report on the ADA was agreed to by the Senate by a vote of 82 to 4 without any significant debate on the employee protection provision. 124 Cong. Rec. 37,416-21 (1978). Senator Cannon described the provision as "important" (*Id.* at 37,416), and Senator Pearson called it "an acceptable compromise that all sides can live with" (*Id.* at 37,417-18).

The House, by a vote of 356 to 6, likewise agreed to the Conference Report. 124 Cong. Rec. 38,526-27 (1978). Congressmen Andersen, Snyder, Johnson, Harsha, and Minetta all commented on the importance of the employee protection provision. *Id.* at 38,521-25. Representative Anderson, who presented the Conference Report, specifically pointed out that the "House provisions on employee protection . . . were stronger than those in the conference bill," but that the House conferees had succeeded in making the Conference bill "considerably stronger" than the Senate bill. 124 Cong. Rec. 38,522 (1978). Representative Harsha, a member of the conference committee, complained that he was not "totally satisfied" with the conference agreement because

> . . . benefits are not to be paid an employee who loses his job . . . until there is at least $7^1/_2$ percent employee reduction in the airline. It makes no sense . . . to defer these benefits until this percentage trigger is reached, causing employees who have not found a job to suffer needlessly. However, in the spirit of compromise we managed to reduce by one-half the percentage trigger in the Senate bill.
>
> [124 Cong. Rec. 38,523 (1978)]

Congressman Minetta, who had been deeply involved in drafting the House's labor protection provisions, elaborated further:

> The Committee on Public Works and Transportation struggled with the problem of employee protection for quite some time before it came around to support almost unanimously the employee protection provision I offered. . .
>
> The labor protective provisions in the House-passed bill were reasonable, responsible legislation. These provisions were to be based on levels of protection established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act. The levels of protection would have assured that an affected employee would not be in a worse position with respect to his employment as a result of passage of the act. An employee who suffered reduction in salary or who was deprived of employment would have been eligible for 100 percent of his average monthly salary for up to 6 years, with moving expenses if necessary and a 12-month lump sum separation payment option. . .
>
> By comparison with the House-passed provision, the conference agreement—which was based on the Senate language—is not much protection at all.

[124 Cong. Rec. 38,524-25 (1978)]

Concerning the legislative veto provision, Congressman Levitas, in the course of commenting on several other provisions of the bill, stated:

> Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a

> one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law.
>
> [124 Cong. Rec. 38,524 (1978)]

Representative Levitas' "observation" is the sole reference to the veto in either the House or Senate debate on the ADA.

SUMMARY OF ARGUMENT

The court of appeals concluded that the veto provision is severable from the remainder of § 43 because the legislative history provides overwhelming evidence that Congress considered the protections afforded employees by that section to be important, but there is no evidence that Congress regarded the veto as significant. As the court pointed out, the legislative history is barren "of any direct statement evidencing a Congressional intent of inseverability;" hence, the case against severability is entirely circumstantial. 766 F.2d at 1563 (Pet. 24a-25a). The record fully supports the court's determination that the circumstances fall "far short" of establishing the requisite intent; if anything, they "positively" buttress the holding in favor of severability. 766 F.2d at 1561, 1565 (Pet. 19a,. 28a).

First, there were only a handful of votes in the Senate opposed to § 43; the House wanted an even stronger employee protection provision; and the committee reports and comments made in debate confirm that labor protection was deemed to be a vital part of the ADA. Notwithstanding uncertainty over the economic consequences of deregulation on airline employees generally, Congress was not uncertain about the need to assist individual employees who had made a career commitment to the industry when it was regulated and relatively stable and who might be

furloughed or terminated through no fault of their own in the new competitive environment.

Second, the authority delegated in § 43 which is subject to the legislative veto is not the sort of authority which Congress has historically been reluctant to part with out of fear that an unchecked delegation would undermine traditional legislative prerogatives. There was no concern that § 43 might permit an unwarranted expansion of executive branch power at the expense of the legislative branch.

Third, the veto provision was not the result of any compromise between the House and the Senate. The provision was in the Senate bill from the outset, and it played no role in the House's eventual acceptance of the Senate's labor protection concept. In fact, the House was willing to delegate far greater authority to the Secretary of Labor to formulate protective arrangements for airline employees without subjecting that authority to a legislative veto.

Fourth, there is no support in the record for Petitioners' argument that Congress was afraid that the Secretary of Labor's administration of § 43 would defeat the objectives of airline deregulation, and, accordingly, inserted the veto provision to allow Congress to check the Secretary's authority. No concern of that nature appears in the committee reports or in floor debate. Moreover, neither of the two components of § 43 present any potential for interfering with deregulation. Financial assistance payments from federal revenues to terminated or furloughed employees would obviously have no bearing on airline operations. Nor would first right of hire impair a carrier's competitive position. The carrier's ability to enter new markets and to price its services remains unaffected because first right of hire does not increase a carrier's labor costs, but merely requires a carrier who is otherwise hiring to give a preference to eligible individuals who meet that carrier's qualifications and are willing to work for the wages and under the working conditions established by

the carrier. If anything, by hiring individuals with considerable experience in the industry, a carrier is likely to improve its ability to compete.

Fifth, especially with regard to first right of hire, § 43 sets forth the nature of the benefits provided in considerable detail. The authority delegated to the Secretary of Labor is circumscribed and quite routine. There is nothing in such a delegation which suggests that the Senate, in enacting a labor protective provision with a veto, and the House, in acquiescing in the Senate's version, regarded the legislative veto as an indispensable rein on the Secretary's authority.

Sixth, had the House's labor protection provision been enacted, the Secretary would have been given extremely broad authority to impose labor protective provisions. The Secretary's decision-making could significantly affect the nature and pace of deregulation under the House bill because "[n]o authority granted by . . . [the Airline Deregulation] Act" could be exercised without a certification from the Secretary that the employees had been adequately protected (*supra*, p. 13). That the House was willing to give the Secretary this authority without attaching a legislative veto to it, and only reluctantly acceded to the Senate's far more modest labor protective provision, compellingly demonstrates that the veto was irrelevant to House action.

Seventh, the legislative history of § 43 indicates that the most likely explanation for the veto provision is that the Senate wanted to retain a check on the financial assistance payment levels established by the Secretary. Since the payments were to be based on wages, these levels could prove to be politically sensitive in view of the high earnings of many airline employees. Nonetheless, although the veto was useful and desirable, it was not essential: financial assistance payments depended on future appropriations, and thus the appropriations process gave Congress the

requisite means to keep a rein on the Secretary if for any reason the veto could not be utilized.

Eighth, in any event, all that is at issue in this case is first right of hire, and there is nothing in the legislative history which ties the veto to that component of § 43. First right of hire can and should be implemented without regard to whether the financial assistance component of § 43 is also implemented. Congress preferred that displaced airline employees obtain jobs, and only if they could not was financial assistance to be made available.

Ninth, the addition of a "report and wait" requirement to the veto provision does not show that the veto was crucial to the enactment of § 43. If anything, "report and wait" diminishes the importance of the veto because it ensures that Congress will receive sufficient advance notification of proposed regulations to overrule them through the normal legislative process should it be dissatisfied. The significance of the veto provision in § 43 further recedes in light of the far more elaborate veto provisions Congress inserted in other statutes. The comparison shows that Congress attached a much higher priority to legislative review in those situations than it did here.

Finally, the court of appeals' severability analysis is not invalid because the court considered whether Congress would have preferred § 43 without the veto to an ADA without a labor protective provision. The court's opinion reflects a thorough canvass of the legislative history in an effort to ascertain legislative intent. The court, in fact, found "not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." (766 F.2d at 1564 (Pet. 28a)). Moreover, there is "not a shred of evidence" either that, but for the legislative veto in § 43, Congress would have enacted a different labor protective provision than it did. Accordingly, it is clearly not "evident" that Congress chose § 43 over other alternatives because of the veto provision, and that, absent the

veto, § 43 would have failed of passage. In this context, and in light of the practical realities, it was entirely appropriate for the court to search for the dominant legislative intent as between preserving § 43 without a veto and tearing down the section in its entirety.

ARGUMENT

I. There Is No Persuasive Basis For Concluding That The Legislative Veto Provision Was Crucial In Any Material Respect To The Enactment Of § 43

A. The Evidence To Support A Determination of Inseverability Is Completely Lacking Here

In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 931-932 (1983), this Court, reaffirming and quoting from *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) and *Champlin Refining Co. v. Corporation Comm'n.*, 286 U.S. 210, 234, (1932), stated "that the invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Petitioners assert no disagreement with this standard. (Pet. Br., p. 14) They argue, however, that it means that "a statutory section containing an invalid provision must fall in its entirety if it appears that absent the invalid part, Congress would have enacted *either* no provision at all *or* one with different form, content or language." (Pet. Br., pp. 14-15) But even with the gloss that Petitioners place on the *Chadha/Buckley/Champlin Refining* standard, the fundamental inquiry is the same: it still must be "evident" that the invalid portion was crucial to passage of the statutory section in question; and, with respect to an unconstitutional legislative veto provision, it still must appear that Congress would have been unwilling to delegate the authority it did unless it could retain a check on that authority by way of the veto. *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 307 (D.C. Cir.

1982); *Consumer Energy Counsel of America v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983). That showing simply has not been, and cannot be, made here. For, as the court of appeals found, the evidence is "[a]mple. . . that the employee protection program. . . was deemed by Congress to be an important aspect of the [Airline Deregulation] Act," whereas, "[i]n contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." 766 F.2d at 1565 (Pet. 28a).) If, as we now demonstrate, the court was correct in concluding that the veto provision was not "deemed to be a vital feature" of § 43 by Congress, it follows that affirmance would be appropriate even under Petitioners' formulation. In other words, as the legislative record confirms, it is far from evident that Congress would have chosen to enact no program at all, or a substantially modified § 43, rather than enact the section as it now stands without the veto.[4]

Although Petitioners do not directly attack the court of appeals' finding that Congress regarded the employee protection program as important, they do so inferentially by referring to what they term the "congressional uncertainty about the need for labor protection" in the ADA. (Pet. Br., pp. 4, 37) Presumably, Congress would be more inclined to insist on retaining a legislative veto over regulations implementing a program the necessity of which was

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[4] In *Regan v. Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 3269, (1984), Justice White's plurality opinion stated: "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Justice Brennan, dissenting in part, was of the view that "severability is exclusively a question of legislative intent." 104 S.Ct. at 3275. Under either view, the finding of the court of appeals that the veto provision was not considered by Congress to be "vital" to § 43—if that finding is borne out by the record—should be dispositive of the severability issue.

in doubt than a program it definitely wanted. However, as Petitioners concede (Pet. Br., pp. 9-10), § 43 was viewed by Congress as a form of insurance. The impact of the deregulatory provisions of the ADA on employees in the airline industry could not be accurately predicted. On the one hand, the proponents of deregulation anticipated that air travel would increase, which, in turn, would bring increased employment opportunities. On the other hand, it was fully recognized that individual employees might well be adversely affected by deregulation as some airlines contracted or went out of business while other airlines prospered and expanded. *Supra*, pp. 4-5; 766 F.2d at 1562 (Pet. 22a). Section 43 was no different than most common forms of insurance: there was uncertainty over the extent to which the contingencies on which the benefits were predicated would materalize; but there was no serious doubt as to the need for protection if they did. In the Senate, an amendment to eliminate § 43 in its entirety was overwhelmingly defeated 85-7. *Supra*, p. 7. And in the House, a labor protective provision which was perceived as far more expansive was passed without controversy. *Supra*, p. 15.

There is no persuasive evidence that Congress would have failed to enact § 43 were it not for the legislative veto. To begin with, § 43 does not delegate authority which has traditionally been jealously guarded by Congress. For instance, there is nothing in § 43 remotely comparable to the authority to restructure the Executive Branch contained in the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, codified at 5 U.S.C. §§ 901 *et seq.*, which was at issue in *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984) (legislative veto provision found severable), in *EEOC v. CBS*, 743 F.2d 969 (2d Cir. 1984) (severability rejected), and in *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984) (severability question not ripe for decision in absence of actual use of veto by Congress). We do not have here delegated authority analogous to the

authority to establish pay schedules for federal employees contained in the salary adjustment statutes at issue in *McCorkle v. U.S.*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (veto proviso held inseverable). No danger exists that the delegation in § 43 might work an unintended shift of govenmental powers as between the separate branches. *See Consumer Energy Council v. FERC, supra*, 673 F.2d at 445, n. 70. Section 43 does not constitute "definitive legislation" which was carefully "designed . . . to mark the limits of Congressional and Presidential power" over appropriated funds. *City of New Haven v. United States*, ___ F.Supp. ___,___ (No. 86-0455) (D.C. D.C. May 16, 1986), slip. op., p. 7 (legislative veto in Budget and Impoundment Control Act of 1974, 2 U.S.C. § 681 *et seq.*, held inseverable).

Moreover, the circumstances with respect to § 43 are not at all like those in *American Federation of Government Employees v. Pierce, supra*, in which one house of Congress acceded to the other house's legislation in lieu of its own, but only reluctantly and after insisting on the insertion of a veto restriction as the price of its acquiescence. True, the House was reluctant to agree to the Senate's labor protective provision. But that was only because the Senate bill was viewed as insufficiently protective of employee interests. *Supra*, pp. 17-18. Furthermore, the veto provision was in the Senate bill from the outset; the record is devoid of any indication that it was inserted in either the initial or the final version of § 43 as the price of House agreement. Of far greater significance is that the House first passed a deregulation bill, H.R. 12611, which gave the Secretary of Labor broad latitude—indeed, far broader than that in the Senate bill—to fashion labor protection arrangements for airline employees, and yet the House attached no legislative veto leash to the Secretary's authority. *Supra*, pp. 13-15. If the House was willing to enact the expansive and non-specific labor protective provision of H.R. 12611 without any veto language, it is log-

ical to assume that it likewise would have been willing to enact § 43 without the veto restriction. As the court of appeals put it, "[i]t seems . . . unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy." 766 F.2d at 1565 (Pet. 28a).

B. Petitioners Are Mistaken In Asserting That The Veto Provision Resulted From Congressional Concern That Administration Of § 43 Might Conflict With Airline Deregulation Objectives

Petitioners argue, however, that a legislative veto was "critical" to enactment of Section 43, but not to the labor protective provision of H.R. 12611, because § 43 "created a program fundamentally inconsistent with the overall deregulatory purpose manifest throughout the Act" (Pet. Br., p. 29). They particularly assert that Congress was especially fearful of first right of hire "regulations that would displace marketplace hiring decisions and . . . thwart the Deregulation Act's overall purpose by overburdening covered carriers" (*Id.* at 30). Petitioners are demonstrably wrong in their contentions.

As shown *supra*, pp. 2-4, 12-13 the type of deregulation that Congress sought to accomplish through the ADA was to substantially increase the ability of new carriers to enter the industry and of existing carriers to expand into new markets, as well as to ensure greater non-predatory fare competition among carriers. First right of hire does not contravene those stated objectives. It clearly does not prevent new entrants from coming into the industry or limit the ability of existing carriers to expand into new markets. And it does not undercut the competitive position of any carrier because it does not require a carrier to do any hiring that it does not plan to do, and does not preclude the carrier from recalling its own furloughed employees before hiring others. Nor does § 43 compel a carrier to pay any higher wages or grant any more favorable work-

ing conditions to an individual entitled to the preference than it would if it hired someone not so entitled. Except for age, a carrier need only hire those who meet its own qualifications, notwithstanding that those qualifications are more stringent than the minimum Federal Aviation Administration qualifications or the qualifications of other airlines.[5] To the extent that compliance with the preferential hiring requirement presents any administrative burden to a carrier, that burden is so slight and its cost so small as to be inconsequential with respect to the carrier's ability to compete. Surely, if there had been any concern in Congress about the impact of first right of hire on the ability of existing carriers to compete in a deregulated environment, that concern would have surfaced in the various committee reports or in floor debate. However, there is nothing in the legislative history which so much as suggests that Congress thought this to be a potential problem or otherwise saw any burden to carriers in first right of hire. For all that appears, it is more likely that Congress accepted the commonsense notion that carriers would benefit by hiring experienced individuals.[6]

There is another equally persuasive reason why Congress manifested no misgivings regarding the authority it delegated to the Secretary of Labor to issue such regulations as "may" be necessary to administer first right of hire: the statutory language defining those entitled to the hiring preference—"protected" employees—was sufficiently elaborate as to leave little in the way of substantive discretion to the Secretary. Thus, the statute was fairly

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[5] Department of Labor regulations implementing first right of hire, which are currently in effect, confirm that carriers are entitled to impose their own qualifications. 29 C.F.R. § 220.21, 50 Fed. Reg. 53103 (Dec. 27, 1985).

[6] Nor is there any suggestion in the legislative history that the financial assistance component of § 43 could frustrate the deregulation objectives of the ADA. Payments which would come from federal revenues could only help disadvantaged employees, not harm the airlines.

detailed in spelling out eligibility requirements and mandating the class of carriers who are obliged to grant the preference; in specifying the manner in which age, seniority, and discharge for cause could or could not be taken into account; in limiting the preference to an individual's occupational specialty; and in permitting a carrier to hire its own furloughed employees before being required to hire others entitled to the preference. *Supra*, pp. 7-10, [illegible], 15-16. As the court stated in *McDonald v. Piedmont Aviation*, 625 F. Supp. 762, 766 (S.D.N.Y. 1986), a private action brought by an individual pilot claiming the defendant carrier wrongfully denied him first right of hire under § 43, "the statute delineates unambiguously the rights and duties of the parties and identifies specifically to whom they should apply," so much so that "the adoption of regulations is hardly necessary to the enforcement of Section 43 of the Act."

And, indeed, the Labor Department's implementing regulations tend to confirm that appraisal. Except insofar as they reiterate the statutory requirements or reflect what § 43 clearly seems to require (*e.g.*, that a "qualifying dislocation" is not a prerequisite for first right of hire, 50 Fed. Reg. at 53094-95), their focus is on the sort of mechanical details—notices to be sent, information to be submitted and published, and procedures to be followed—which could scarcely be considered of much interest to Congress. 29 C.F.R. Part 220, 50 Fed. Reg. 53094-53105 (Dec. 27, 1985). Arguably, the Secretary made "policy" decisions in requiring carriers to wait 30 days after notifying the Labor Department of a vacancy before hiring an applicant not entitled to first right of hire (50 Fed. Reg. at 53095), and in allowing a carrier having a specific equal employment opportunity requirement to place that requirement ahead of its first right of hire obligation (50 Fed. Reg. 53096). But these are ordinary pragmatic administrative determinations which merely serve to highlight the routine nature of the authority delegated to the Secretary.

By contrast, the authority that would have been delegated to the Secretary of Labor in the House bill is of a different level entirely. Had the House bill become law, the Secretary was not merely authorized, but virtually instructed, to play a major role in regulating the pace of deregulation because no authority granted by the ADA could be exercised until the Secretary certified that affected employees were protected. *Supra*, p. 13. And the Secretary was not only directed to ensure that the affected employees were not put in a worse position, but also given extremely broad powers to achieve that result. *Supra*, pp. 13-14. The guidelines set by reference to Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Act are general ones, and, by the very terms of those provisions, are only a floor, not a ceiling. *Supra*, pp. 13-15.

To be sure, as Petitioners point out (Pet. Br. p. 33), the arrangements imposed by the Secretary would likely deal "with specific companies, workers, route terminations, and employment dislocations that were a direct result of some private transaction or government approval." But that would provide small comfort to any carrier seeking to utilize the new authority contained in the ADA. No such carrier could do so without contemplating the economic consequences that would flow from the labor protective arrangements likely to be imposed by the Secretary. The cost of those arrangements would inevitably be calculated by airlines in deciding whether, under the aegis of the ADA, to consolidate or terminate routes, to expand into new markets, to merge with another carrier, or to establish a lower fare structure. Obviously, the Secretary's authority to require such arrangements would become a significant factor in this kind of airline decision-making. Nonetheless, the House was willing to give the Secretary this authority without proposing or even discussing any restraint on the Secretary by way of a legislative veto limitation.

In short, analysis of the legislative history reveals that it was not the impact of Section 43 on deregulation that evoked Congressional concern, but rather the potential impact of deregulation on airline employees that caused a concerned Congress to ameliorate the effects of that impact without changing the deregulation process itself.

Moreover, unlike the speculative and implausible explanation advanced by Petitioners in an effort to demonstrate that § 43 would not have been enacted without a legislative veto, there is a perfectly straightforward explanation which fits logically with the legislative history as to why the Senate inserted a non-essential veto provision in § 43 and the House went along with it. Thus, the aspect of § 43 that provoked significant controversy in the Senate was the financial assistance component. Senator Zorinsky's effort to defeat it in Committee lost by a narrow margin as did his renewed attempt on the Senate floor. *Supra*, pp. 6-7. Both the Committee Report and floor debate reflected Congressional anxiety about the overall cost to the Treasury and the political sensitivity of salary protection for individuals with high earnings. *Supra*, pp. 6-7, 10-12. In fact, § 43 was successfully amended by Senator Cannon on the Senate floor to ensure that the Secretary of Labor was authorized to establish payment levels which were below that of full salary and benefits. *Supra*, p. 11. By contrast, there was no specific controversy over first right of hire. Senator Hatch, who opposed any employee protection provision on principle, garnered only seven votes in support of his amendment to eliminate § 43 in its entirety (*supra*, p. 7), and other Senators commented on the importance of the provision. *Supra*, pp. 7, 17. Senator Zorinsky, notwithstanding his opposition to financial assistance, had no difficulty in accepting first right of hire and even introduced an amendment to strengthen the hiring preference. *Supra*, pp. 6, 10. Significantly, the only mention of the veto provision in the Senate was not made in connection with first right of hire, but rather was in

regard to financial assistance: the Senate Report explained that, although the Committee had considered setting wage percentage figures and maximum dollar amounts, it had decided to let the Secretary of Labor do that by regulation, and that such "regulations will be subject to congressional review." *Supra,* p. 11. The Senate Report thus unmistakably ties the veto provision to the Congressional interest in reviewing the Secretary's performance of his assigned task of determining payment levels. All of these circumstances persuasively support an inference that the motivating factor for the veto provision in the Senate, where it originated, was a desire to retain a Congressional check on the substantive details of the financial assistance program.

The House, which acceded to the Senate version of § 43 after changes favorable to employees were made in Conference, had no reason not to accept the legislative veto restriction contained therein. For all that appears—with one exception—the veto restriction made no difference one way or another in the House. The exception is the lone comment of Congressman Levitas (*supra,* pp. 18-19) expressing approval of the presence of a legislative veto in § 43. However, as the court of appeals pointed out, "[b]y his own description, Rep. Levitas was 'making [an] observation,' . . . not setting forth what he was maintaining to be an indispensable legislative ingredient of an acceptable bill." 766 F.2d at 1563, n.12 (Pet. 23a). Moreover, "Rep. Levitas was a vigorous advocate generally for the proposition, eviscerated by *Chadha,* that Congress must retain control over administrative agencies via the legislative veto device." 766 F.2d at 1563 (Pet. 24a), citing Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms,* 12 Hofstra L. Rev. 593, 611-12 (1984). However, "there is not a shred of evidence that Rep. Levitas' statement represented the view of Congress as a whole (or even his full Committee) [he was a member of both the House and Conference committees which consid-

ered the ADA], nor is there any indication that Congressman Levitas himself attached especial significance to this particular veto provision, as opposed to his keen interest generally in seeing the incorporation of such devices in legislation enacted by the Congress." 766 F.2d at 1563 (Pet. 25a). In short, the evidence is lacking that Representative Levitas himself, much less any other representative, would have voted against the conference substitute had the legislative veto not been a part of § 43. *See, Consumer Energy v. FERC, supra,* 673 F.2d at 443-444 ("Nothing in these dozens of remarks remotely indicates that these proconsumer arguments would have changed into opposing arguments had Phase II not been made subject to legislative review.").

Even though the Senate may have preferred that Congress retain a veto over the Secretary of Labor's administration of financial assistance authorized by § 43, it is by no means apparent that the Senate would have been unwilling to enact the same authorization absent a veto once the Conference Committee inserted qualifying language making certain that all monetary compensation authorized was contingent on subsequent appropriations. *Supra,* p. 16. The appropriations would then provide an absolute Congressional check on the financial assistance program.[7] Furthermore, there is absent from the legislative history here the type of strong, positive indications which courts have relied on in other cases to find that the substantive provisions of a bill would not have been enacted in the absence of a veto provision.[8]

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[7] 1 Mezines, Stein and Gruff, *Administrative Law* § 3.02 at 3-61 and authorities cited therein at n. 1 ("The denial or reduction of appropriations because of administrative or executive action of which Congress disapproves" is "one of the most commonplace methods of Congressional control. . .").

[8] In *McCorkle v. U.S., supra,* 559 F.2d at 1262, the Fourth Circuit emphasized that, when some members of Congress protested during

In any event, it is academic whether the financial assistance portion of § 43 would have been enacted without the veto reservation. Because Congress has never appropriated any funds to provide such assistance and may never do so, it is immaterial whether or not the veto provision was crucial to passage of that portion of § 43. All that is presently operative is first right of hire, and there is every reason to go forward with that part of the program even if a legitimate question could be raised concerning the other part. Although, as Petitioners assert (Pet. Br., p. 3), first right of hire and financial assistance are "closely linked components," the linkage is one in which the hiring preference is the remedy of choice for cushioning the impact of deregulation on airline employees, and monetary compensation is a secondary or fallback remedy. To the

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vigorous debate that a federal pay bill would delegate excessive authority to the President, the bill's defenders repeatedly responded "that Congress could veto the President's suggestions." In *EEOC v. CBS*, *supra*, 743 F.2d at 972-973, the Second Circuit emphasized that the Reorganization Act was viewed as a compromise in which the veto provision played such a central role that Congress, warned of possible constitutional problems, nevertheless decided "the risk [was] worth taking" and, accordingly, rejected efforts to delete the provision or add a severability clause. In *American Federation of Government Employees v. Pierce*, *supra*, 697 F.2d at 306-307, the District of Columbia Circuit emphasized that the legislative veto language was the result of a compromise, and that severance would produce a result—a complete ban on reorganizing the Department of Housing and Urban Development—which Congress plainly did not intend. And in *City of New Haven v. United States*, *supra*, slip op., pp. 7, 9, the district court emphasized that "Congress was intent upon recovering its primacy in matters of money and spending for all time," and the "one-House veto was specifically extolled as an integral component of the control machinery being considered." *Compare, EEOC v. Hernando Bank*, *supra*, 724 F.2d at 1192 ("Mere uncertainty about the legislature's intent is insufficient to satisfy the test announced in *Buckley v. Valeo.*"); *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (Temp. Emer. Ct. App.), *cert. denied*, 105 S.Ct. 173 (1984) (fragility of a compromise is insufficient to establish non-severability in the absence of "a clear indication" that the statutes would not have been passed without legislative veto provisions).

extent employees entitled to first right of hire are successful in obtaining new jobs, their need for and entitlement to financial assistance will be reduced or eliminated. Even if Congress had appropriated funds to implement the financial assistance component of § 43, the objectives of the statute would be fully satisfied if not a penny had to be spent because all eligible employees obtained new jobs as a result of first right of hire. Accordingly, whatever the status of the financial assistance component of § 43—that is, whether it is dormant because of a lack of appropriations or rendered inoperative because of its relationship to the invalid legislative veto—Congress obviously intended first right of hire to continue.[9]

C. Petitioners Do Not Otherwise Show That The Veto Provision Was Crucial To Enactment Of First Right Of Hire

In this Court, as in the court of appeals, Petitioners, "[f]ailing to find any direct statement evidencing a Congressional intent of inseverability, . . . advance various items of circumstantial evidence of what they perceive to be such an intent." 766 F.2d at 1563 (Pet. 24a-25a).

Thus, Petitioners argue that "[b]y strengthening the Section 43 veto in Conference and at the same time removing a veto provision from a section that was at least as controversial as Section 43, Congress unmistakably demonstrated its serious reservations about the regulatory authority delegated to DOL" (Pet. Br., p. 44). The "strengthening" to which Petitioners refer is the addition of a "report and wait" requirement that, thirty days prior to issuing rules and regulations implementing § 43, the Secretary of Labor must submit them to the House and Senate committees primarily responsible for the ADA. As

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[9] The Senate Report anticipated that, as a result of first right of hire, "few . . . employees would be without work for a long period of time" and that cash payments under the financial assistance program would thereby be decreased. Senate Report, p. 116.

the court of appeals recognized, "[t]his mechanism may reasonably be viewed as the assertion of interest by committees not normally charged with the review of the labor regulations. . ." 766 F.2d at 1564 (Pet. 25a). However, there is nothing in the record which indicates precisely why the committees had such an interest. Yet, given the controversy over the financial assistance program, the uncertainty about its cost, and especially the political sensitivity of the payment levels, almost surely the monetary compensation component of § 43 was the source of that interest, rather than the hiring preference which is at issue in this litigation. In any event, whatever the basis of the committees' interest as manifested by the addition of the "report and wait" provision, interest alone "does not indicate that the veto is inseverable, particularly since the 'report and wait' clause remains inviolate notwithstanding *Chadha*." 766 F.2d at 1564 (Pet. 25a).[10] Moreover, as to both the financial assistance and first right of hire components of § 43, the addition of the "report and wait" requirement makes it more likely, not less, that Congress would have enacted § 43 as it now stands—that is, without an operative veto provision. For, although "report and wait" does not give Congress as much control as the veto, it does give the relevant committees advance notice of proposed regulations, and, hence, the opportunity to make their views known before the regulations are actually issued and during a period when they could easily be modified. If the Secretary of Labor was nevertheless determined to issue the regulations in disregard of the committees' views, Congress could make use of the constitutional legislative process to achieve a different result. Accordingly, "report and wait" is a workable procedure

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[10] This Court made clear in *Chadha* that its ruling declaring legislative veto provisions unconstitutional was not meant to express disapproval of "report and wait" provisions, the validity of which has previously been upheld. *Chadha, supra*, 103 S.Ct. at 2776, n. 9, citing *Sibbach v. Wilson*, 312 U.S. 1 (1941).

which preserves a measure of legislative review and thereby diminishes the importance of the veto; in other words, a veto is less necessary with "report and wait" than without it. *Cf. Gulf Oil Corp. v. Dyke, supra,* 734 F.2d at 804, n. 26.

As for the removal of legislative veto language from a section other than § 43, the Senate bill provided that either house could disapprove CAB rules issued on an emergency basis modifying the automatic entry program established as part of the deregulation effort. 124 Cong. Rec. 10,701 (1978) (§ 5, S. 2493, amending § 401 of the Federal Aviation Act by, *inter alia,* adding new subsection k(11) (B)); Senate Report, p. 16. This legislative veto provision was dropped in Conference, although the Conference report is silent as to why. Conf. Report, pp. 66-67. However, the automatic entry program extended only through 1981, and emergency modification of the program during the three years it was in effect was an unlikely contingency. Furthermore, the conditions for exercise of the emergency authority were rather precisely spelled out, and use of the authority would be subject to judicial review. *See* § 12, ADA, 92 Stat. 1718, amending 49 U.S.C. § 1371(d) *inter alia* adding subpar. 7(D). In these circumstances, the Conference Committee could well have deemed a legislative veto superfluous in the automatic entry section, but still have preferred to retain the veto in § 43 in light of the authority given to the Secretary of Labor with respect to monetary compensation. In any event, absent any legislative history showing a connection between the two, it is at best a tenuous inference that because Congress deleted the veto from the automatic entry section, it would not have enacted the entirely unrelated § 43 unless a veto provision was included.

It is equally tenuous to argue, as Petitioners do (Pet. Br., pp. 28-29), that the veto provision was crucial to passage of § 43 because "only DOL's delegation to implement the EPP was made subject to a legislative veto." As the

court of appeals aptly responded, it is "hardly surprising" that § 43 was "the most likely candidate for inclusion of a legislative veto device" in what otherwise is a deregulatory statute. 766 F.2d at 1563 (Pet. 25a-25a). Thus, the basic thrust of the ADA is to limit rather than to expand the CAB's regulatory authority. *Supra*, pp. 3-4, 12-13. Congress could have decided to "indicate its preference for increased competition in a general way, leaving the particular details of reform to the Board. . ." Senate Report, p. 4. Instead, it chose to "deprive the Board of some of its discretion so that anticompetitive policies cannot reemerge in the future. . ." *Ibid.* Inasmuch as a legislative veto normally operates as a check on the manner in which an agency affirmatively uses its delegated authority, it would have made little sense to insert legislative veto provisions in the numerous sections of the ADA which operate to reduce agency discretion—that is, which require the CAB to regulate less and to allow market conditions greater play in determining routes and fares. By contrast, § 43 established a new program, and Congress could rationally desire a veto provision as a check on the newly delegated authority it conferred on the Secretary of Labor to administer that program, and especially to set payment levels. But that says nothing about whether Congress considered the veto so essential that it would not have granted the Secretary the authority it did without retaining a veto.[11]

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[11] Petitioners assert that the ADA contains "at least 25 distinct delegations of regulatory authority" (Pet. Br., p. 28). To the extent that various sections of the ADA (other than § 43) do provide for issuance of rules and regulations which could have been subjected to a veto restriction, the nature either of the authority granted or of the subject matter tends to be self-explanatory as to why there is no such restriction. Petitioners specifically mention only four such "distinct delegations" (Pet. Br., p. 29, n. 35). As just discussed, one of these, the exceedingly narrow authority to modify by rule "on an emergency basis" the automatic entry program, is readily differentiated from the § 43 type of authority. Another, the FAA's duty to establish safety standards (§ 5, 92 Stat. 1709, and § 33, 92 Stat. 1738), concerns a

Petitioners also contend that the requirement that final regulations of the Secretary of Labor implementing § 43 be promulgated within six months (*supra*, p. 16) enhanced the importance of the veto provision because it "guaranteed that the regulations would be reviewed by essentially the same members of Congress who, through their positions on the aviation committees, shaped the Deregulation Act. . ." (Pet. Br., pp. 32-33). Here again, Petitioners' contention is nothing more than speculation, unsupported by legislative history. Moreover, as the court of appeals pointed out, there is an opposing inference which is at least as persuasive: the six months requirement "could just as readily be seen as an indication of the high importance Congress attached to the employee protection plan, which Congress mandated be implemented as quickly as possible." 766 F.2d at 1564 (Pet. 26a). The latter inference surely is more consistent with the committee reports and comments made in floor debate. *Supra*, pp. 4-6, 7, 15, 17-18. Furthermore, contrary to Petitioners (Pet. Br., pp. 32-33), the six months requirement could not assure that "essentially the same members of Congress" would review the Secretary's regulations, inasmuch as the 1978 Congressional elections would have intervened between the October 23, 1978 date of enactment of the ADA and issuance of the Secretary's regulations. There obviously could be

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technical subject in which the regulatory details are more suitable for evaluation by experts than particularized oversight by Congress. The third—the CAB's duty to establish, by rule, objective criteria for designating "eligible points" for purposes of providing essential air service to small communities, and also to promulgate guidelines for "computing the fair and reasonable amount of compensation required to insure the continuation of service to any eligible point" (§ 33, 92 Stat. 1732, 1736, 1739)—merely requires elaboration of factors which the statute already sets forth in detail; hence, Congress had scant reason to fear that the criteria and guidelines would not reflect its wishes. The fourth—the CAB's obligation, under revised procedures, to consider applications for route certifications (§ 7, 92 Stat. 1711, and § 8, 92 Stat. 1712)—leaves no room for a legislative veto of anything other than the Board's processing and determination of individual cases.

no "guarantee" that the members of the Congress who were the primary sponsors of the ADA in general, and of § 43 in particular, would be reelected, or, if reelected, would have the same committee assignments.

Finally, Petitioners urge that the "unique combination of features"—the six months requirement coupled with the "review and wait" and legislative veto provisions—"create a review procedure that ensured intimate congressional involvement in the development of the EPP" (Pet. Br., pp. 31-32). For a number of reasons, this argument is farfetched. First, aside from the monetary compensation levels, Congress was sufficiently specific in § 43 as to leave little room for administrative development (especially when compared to the labor protective program proposed by the House). *Supra*, pp. 28-31. Second, the six months requirement can readily be explained as evincing Congressional interest in getting the labor protection program moving quickly rather than in legislative review of that program. Third, if continued intimate involvement in the labor protection program was a Congressional objective, it is odd, indeed, that such a seemingly significant purpose is nowhere mentioned in the committee reports or in floor debate. Instead, the Senate Report refers only to the far more modest goal of ensuring Congressional review of the "statutory percentage figures [of former wages] and maximum dollar amounts" to be set by the Secretary in connection with the financial assistance aspect of the program. Fourth, as Petitioners acknowledge (Pet. Br., p. 31), there is nothing unique about statutory deadlines for issuing regulations or "report and wait" and legislative veto provisions. Each has separately been incorporated in numerous statutes. However, as the court of appeals concluded, their combination here does not point to "anything of decisional import." 766 F.2d at 1564 (Pet. 25a). Of greater significance, we suggest, is that Section 43's veto provision is by no means the strongest rein on delegated authority that Congress could devise. In matters which Congress attached

a high priority to preserving legislative review, such as reorganization of the Executive Branch, the veto provision is considerably more elaborate and more compelling.[12] That Congress chose a weaker veto provision in § 43, when there was precedent for a stronger one, further undercuts Petitioners' argument that inclusion of the legislative veto was crucial to the section's passage.

II. THE COURT OF APPEALS APPLIED A PROPER TEST FOR DETERMINING SEVERABILITY

Petitioners concede (Pet. Br., pp. 14, 15), as they must, that the court of appeals correctly began its severability analysis with the question of whether it is "evident" that Congress would have failed to enact § 43 in the absence of a legislative veto provision. 766 F.2d 1559-60 (Pet. 16a-18a), citing *Regan v. Time, supra; Chadha v. INS, supra; Champlin Refining Co. v. Corp. Comm'n., supra; Buckley v. Valeo, supra.* However, Petitioners fault the court (Pet. Br., pp. 14-26) for asking the additional question of whether Congress would have preferred § 43, after severance of the veto provision, to "no statute at all." 766 F.2d at 1560 (Pet. 19a), citing *Gulf Oil Corp. v. Dyke,* 734 F.2d 797, 804 (T.E.C.A.), *cert. denied,* 105 S.Ct. 173 (1974).

Had the court of appeals not posed the second question and analysed the severability issue in light of the first

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[12] The Reorganization Act provides that the President is required to submit each proposed reorganization plan to Congress; immediately after such submission, resolutions of disapproval are automatically introduced in both the Senate and the House and referred to designated committees; after 45 days, the resolutions are automatically placed on the appropriate calendars in the Senate and the House even if they were not reported out of committee; any member of Congress could at this point move for consideration of the disapproval resolution; and a majority "yes" vote in either the House or the Senate would veto the plan. 5 U.S.C. §§ 909-912. Other statutes contain veto provisions along the same lines: *e.g.,* 15 U.S.C. § 3417; 29 U.S.C. § 1306; 42 U.S.C. § 2159; 42 U.S.C. §§ 8724, 8725; 43 U.S.C. § 1337(a)(4); and 50 App. U.S.C. § 2097.

question only, the result would have been exactly the same and, indeed, so would the court's analysis. For, although Petitioners contend otherwise, there is *no* "strong evidence that Congress would have preferred to enact something different" than the current § 43 if the legislative veto provision could not be included. (Pet. Br., p.26). Instead, as we have shown (*supra*, pp. 23-27), what is striking about this case is the complete lack of any such evidence in the pertinent legislative history, especially the committee reports and floor debate. As the court held, there is "ample evidence . . . that the employee protection program . . . was deemed by Congress to be an important aspect of the [Airline Deregulation] Act," but "not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan" (766 F.2d at 1565 (Pet. 28a)). This conclusion, the product of a careful search of legislative records, is dispositive of the severability issue under any plausible test.[13]

Petitioners criticize the court of appeals for failing to take into account that there are alternatives besides, on the one hand, the current version of § 43 stripped of the veto, and, on the other, no labor protective provision whatever. They argue that, had Congress known the veto provision would be struck down as unconstitutional, it might have enacted an altogether different type of protection program for airline employees or a substantially modified § 43. (Pet. Br., p. 18). If it were evident here that, but for the inclusion of the legislative veto in § 43, Congress would have chosen a different option—for instance, the

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[13] Petitioners imply that the court of appeals arrived at its conclusion by mechanical application of an erroneous standard as opposed to "a painstaking inquiry into legislative intent." (Pet. Br., p. 20). The implication does not withstand scrutiny. A substantial portion of the court's opinion was devoted to just that "painstaking inquiry into legislative intent"—as well as a thorough discussion of Petitioners' arguments—which Petitioners now accuse the court of avoiding. 766 F.2d at 1560-65 (Pet. 19a-28a).

House provision in lieu of § 43—there would be some force to the argument that the court of appeals ignored a relevant consideration. But this is not a case where a showing of that nature has been, or can be, made. There was accordingly no reason for the court of appeals to accept the unfounded speculations advanced by Petitioners as to what Congress might have done had it been prescient enough to anticipate *Chadha*.

Nor was it in any way impermissible for the court to add by way of elaboration that the "evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan." 766 F.2d at 1561 (Pet. 19a). Surely, a key consideration in any severability analysis is whether the end result will be an outcome Congress plainly never intended. For instance, as the court of appeals pointed out (766 F.2d at 1564-65 (Pet. 27a-28a)), in *American Federation of Government Employees v. Pierce, supra,* severance of a legislative veto provision would have left in place a complete ban on reorganizing the Department of Housing and Urban Development, a consequence which "it was abundantly clear" would have been unacceptable to Congress. Accordingly, the court in *Pierce* decided against severance. So, in the instant case, the court quite properly focused on which result—"excision of the veto provision" or "demolition of the airline employee protective prescriptions" (766 F.2d at 1565 (Pet. 29a) (concurring opinion of Ginsburg, J.)—Congress would have found least acceptable. The court had little difficulty in making that choice: as concurring Judge Ginsburg succinctly put it, whereas "[d]eletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress," by contrast "[a] declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will. *Cf. Buckley v. Valeo,* 424 U.S. 1, 108-09. . ." *Ibid.*

The court could not very well ignore the foregoing and still be faithful to the "cardinal principle of statutory construction" which "is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). Petitioners respond that "[t]o save statutes in a form inconsistent with congressional intent threatens, not preserves, the role of the legislative branch." (Pet. Br., p. 22, n. 23). Here, however, the court explicitly acknowledged that its "charge . . . to save as much of the statute as we can" must be carried out "consistent of course with the underlying legislative intent." 766 F.2d at 1560 (Pet. 18a). The search for probative legislative intent is precisely the point of the court's inquiry as to whether Congress "would have preferred no employee protection program over the program passed by Congress shorn of its veto provision." 766 F.2d at 1565 (Pet. 28a). Such an inquiry appropriately recognizes and takes into account the practical reality that a determination of inseverability would, indeed, leave the ADA with no employee protection program. And that is a result which the legislative history clearly shows to be at odds with the importance Congress attached to the program (*supra*, pp. 4-6, 7, 15, 17-18), whereas there is nothing in the committee reports or floor debate which indicates that Congress would have failed to enact § 43 in the absence of the veto provision.

Petitioners urge that "the responsibility for remedial action should be left . . . with the legislature." (Pet. Br., p. 18). But even Petitioners concede that as a necessary predicate it must "appear . . . that congressional preference would have been for a law other than that which would remain after severance. . . " *Ibid.* Here, the predicate has not even come close to being established.

In this context, then, the court of appeals was right to ask whether Congress would have wanted an ADA entirely without a labor protective provision or an ADA with the labor protective provision that had been enacted minus the

legislative veto. In responding that Congress clearly would have preferred the latter, the court adequately addressed and rejected any contention that, but for the veto provision, Congress would have withheld the delegation of authority to the Secretary of Labor to issue regulations implementing § 43. In short, it was simply not "evident" to the court that loss of the veto provision would have doomed § 43. We submit that Petitioners have failed to demonstrate either that the court did not make the appraisal required by the *Chadha—Buckley—Champlin Refining* standard, or that, in making that appraisal, the court's assessment of legislative intent was incorrect.

CONCLUSION

For the reasons set forth herein, Respondent Air Line Pilots Association urges that the decision of the court of appeals should be affirmed.

Respectfully submitted,

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
Counsel for Air Line Pilots Ass'n., Int'l.

Counsel of Record

Of Counsel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

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OCTOBER TERM, 1986

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE SEVERABILITY TEST ESTABLISHED BY THE COURT OF APPEALS RADICALLY DEPARTS FROM THE *CHAMPLIN* STANDARD 2

A. Under The Guise Of *Champlin*, The Court Of Appeals Substituted A Strong Presumption Of Severability For A Careful Analysis Of Legislative Intent 3

B. The Severability Test Established By The Court Of Appeals Requires Judicial Reconstruction Of Remaining Statutory Provisions 8

II. RESPONDENTS DO NOT REFUTE EVIDENCE THAT CONGRESS WOULD NOT HAVE ENACTED THE REMAINING PROVISIONS OF SECTION 43 IN THE FORM IT DID WITHOUT THE VETO PROVISION 12

A. Under Its Severability Standard, The Court Of Appeals Rejected Evidence That Congress Would Not Have Enacted The Remaining Provisions Of Section 43 Without A Legislative Veto 13

B. The Legislative Veto Was An Integral Part Of The Restricted Authority Delegated To DOL Under Section 43(f) 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page

Alaska Airlines, Inc. v. Brock, 632 F. Supp. 178 (D.D.C. 1986), *appeals docketed*, Nos. 86-5042 and 86-5085 (D.C. Cir. Jan. 27 and Feb. 13, 1986) 11
Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985) 2-3, 8, 12, 13, 15
Alaska Airlines, Inc. v. Donovan, 594 F. Supp. 92 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985) 2, 13, 15
Carey v. Population Services International, 431 U.S. 678 (1977) 6
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 6
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Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) 4
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 13
Davis v. Wallace, 257 U.S. 478 (1922) 10
EEOC v. CBS, Inc., 743 F.2d 969 (2d Cir. 1984) 9
El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87 (1909) 8
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 3, 5, 8
McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 12
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 6
Regan v. Time, Inc., 468 U.S. 641 (1984) 7
Sloan v. Lemon, 413 U.S. 825 (1973) 6
Spraigue v. Thompson, 118 U.S. 90 (1886) 6, 8
Tilton v. Richardson, 403 U.S. 672 (1971) 6-7
Warren v. Charlestown, 2 Gray 84 (Mass. 1854) 4, 15-16
Williams v. Standard Oil Co., 278 U.S. 235 (1929) 5

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS	Page
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982))	*passim*
49 U.S.C. app. § 1552(b)(2)	16
49 U.S.C. app. § 1552(d)(3)	16
Interstate Commerce Act, 49 U.S.C. § 11347 (1982)	14
Rail Passenger Service Act, 45 U.S.C. § 565 (1982)	14
Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192	9
LEGISLATIVE AND EXECUTIVE MATERIALS	
H.R. 12611, 95th Cong., 2d Sess. (1978)	14
S. 2493, 95th Cong., 2d Sess. (1978)	14
H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. (1978)	14-15
S. Rep. No. 631, 95th Cong., 2d Sess. (1978)	16, 17
Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 1st Sess. (1977)	18
48 Fed. Reg. 52,854, 52,862 (1983)	11
MISCELLANEOUS	
Note, *Separability and Separability Clauses*, 51 Harv. L. Rev. 76 (1937)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-920

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents' defense of the holding below—that the legislative veto provision of Section 43 of the Airline Deregulation Act ("Deregulation Act") is severable from the remaining provisions of that same section—further demonstrates the court of appeals' radical departure from the severability standard set forth in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932). Respondents mischaracterize petitioners' position and resort to mechanical formulas and presumptions to avoid a searching analysis of whether Congress would have enacted the remaining provisions of Section 43 in the form it did had it known the legislative veto was invalid. In so doing, respondents, like the appellate court, would have this Court usurp legislative prerogatives by reconstructing Section 43 and delegating to the Department of Labor ("DOL") greater regulatory power than Congress ever intended. Since the legislative veto was the cornerstone of the congressional-executive partnership

created by Section 43(f) to develop a single Employee Protection Program ("EPP"), however, the remaining provisions of the same section cannot be preserved without violating congressional intent.

I. THE SEVERABILITY TEST ESTABLISHED BY THE COURT OF APPEALS RADICALLY DEPARTS FROM THE *CHAMPLIN* STANDARD.

Respondents attempt to blur the distinction between this Court's severability standard, which was applied by the district court below, and the new standard articulated by the court of appeals. Although the district court found Section 43 severable from the remainder of the Deregulation Act, it held that the "legislative veto provision of § 43 is inextricably bound to the remainder of *that section*, and that Congress would not have enacted the *remainder of § 43* in its absence." *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 96 (D.D.C. 1984) (37a), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985) (emphasis added). Following the *Champlin* test, the district court sought to determine whether Congress would have enacted *those provisions* which are within its power, independently of that which is not. It did not ask "whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute." *Id.* at 94 n.3 (33a n.3) (emphasis in original). The district court recognized that "[t]he task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself." *Id.*

Respondent Secretary of Labor contends that the appellate court "faithfully applied" the rule prescribed by this Court, DOL Br. at 12, yet concedes that the court of appeals asked not whether Congress would have enacted the remaining provisions of Section 43 if it had known the veto was invalid, but whether "Congress would have preferred no airline employee protection provision at all

to the existing provision *sans* the veto provision." *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1561 (D.C. Cir. 1985) (19a). The court of appeals' test thus requires severance whenever a court decides that Congress thought the purpose or subject matter of the statutory section was important, *id.*, obviating the need for a searching inquiry into whether Congress would have been satisfied with how the remaining provisions achieve the statutory objective. In applying its novel standard, the court below consistently rejected as irrelevant evidence of such congressional intent in the statute's language, structure, and legislative history. *See id.* at 1560, 1561, 1563, 1564, and 1565 (18a, 19a, 25a, 26a, and 28a). Respondents argue that if Congress is not satisfied with a court's reconstruction of Section 43, it can modify it later. DOL Br. at 19. But this Court has consistently placed the responsibility for reconstruction on Congress when it is evident that an invalid provision is an integral part of a statutory section.

A. Under The Guise Of *Champlin*, The Court Of Appeals Substituted A Strong Presumption Of Severability For A Careful Analysis Of Legislative Intent.

Unlike the statute addressed in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 932 (1983), the Deregulation Act expresses no congressional preference for severability. Nonetheless, respondents begin their analysis by claiming that even in the absence of a severability clause, this Court has established in *Champlin* and other severability cases a "strong presumption . . . in favor of severance." DOL Br. at 17. This simply is not the case. In *Champlin*, this Court held that if a portion of a statutory section was unconstitutional, the entire section must fall if "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *Champlin*, 286 U.S. at 234. The key in this

and subsequent cases was thus whether the legislature would have been satisfied with what remained after severance.

Even though the explicit severability clause in the *Chadha* statute provided a presumption of severability, the Court there nevertheless carefully analyzed the legislative history to determine if there was sufficient evidence that Congress would have passed the remainder of the statute in the absence of the severed portion. Both *Champlin* and *Chadha* thus reaffirmed that severability depends on "whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." In the absence of an express congressional declaration, "the imposition of any unspecified burden of persuasion on either side [is not] beneficial to the inquiry." *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) (footnote omitted).[1]

Respondents devise support for this "strong presumption" with references to unconnected phrases and disparate cases. First, respondent Secretary of Labor con-

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[1] *Chadha* and *Champlin* are completely consistent with the doctrine of severability as it has developed over the years. In *Warren v. Charlestown*, 2 Gray 84 (Mass. 1854), the Massachusetts Supreme Court case that is the genesis of severability analysis, Chief Justice Shaw declared that in order for an unconstitutional portion of a statute to be severable,

> "the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

2 Gray at 99.

tends that the "unless it is evident" phrase in *Champlin* creates a strong presumption of severability. Read in its entirety, the test in *Champlin* implies no presumption whatsoever:

> "The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

286 U.S. at 234. At most, the test merely disavows a presumption of *non*severability[2] and confirms that a court must examine legislative intent to determine whether Congress would have enacted the remaining parts of Section 43 without the legislative veto.

Respondents also misapply *Chadha's* language that an invalid provision "is *further* presumed severable if what remains after severance 'is fully operative as a law.'" 462 U.S. at 935 (quoting *Champlin*, 286 U.S. at 234) (emphasis added). Where Congress has expressly declared a provision severable, an invalid provision nonetheless can be severed only if what remains after severance is workable. *See* Pet. Br. at 22 n.24. Thus, the presumption created by the severability clause in *Chadha* was furthered by the operability of what remained. In the absence of an express congressional declaration, however, the majority of this Court has never found a presumption of severability merely because part of the section remaining after severance could still be made to function. In such circumstances, the courts must do what they always do—determine the legislative intent from the language, structure and history of the statute. Creating a

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[2] Prior to *Champlin*, the Court had held that in the absence of a severability clause, the invalid provision should be presumed nonseverable. *See Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42 (1929).

presumption based solely on operability could lead to absurd results the legislature never intended.[3]

Respondents further rely on *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), which quotes the rule articulated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), that "[t]he cardinal principle of statutory construction is to save and not to destroy." DOL Br. at 13.[4] Contending that the court of

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[3] In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), a case cited by respondent Secretary of Labor, DOL Br. at 19, Congress had enacted a legislative scheme designed to stabilize bituminous coal production. The Court declared the provisions setting wage rates unconstitutional. Although the Court found that the provisions setting prices were constitutional and could operate independently, it held the unconstitutional portion inseverable because the Court had no "authority . . . by construction, to convert the manifest purpose of Congress to regulate production by the mutual operation and interaction of fixed wages and fixed prices into a purpose to regulate the subject by the operation of the latter alone." 298 U.S. at 316. *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 708 n.2 (1977) (Powell, J., concurring in part) (although the statute prohibiting distribution of contraceptives to minors could be severed and applied to individuals other than parents and married minors, "the result 'would be to create a program quite different from the one the legislature actually adopted,'" quoting *Sloan v. Lemon*, 413 U.S. 825, 834 (1973)); *Sloan, supra* (the Court declared inseverable the unconstitutional provision of aid to sectarian schools since the provision of aid only to nonsectarian schools was not the legislature's intent); *Spraigue v. Thompson*, 118 U.S. 90, 94-95 (1886) (Georgia statute requiring vessels to hire pilots that contained an unconstitutional exception for boats travelling intrastate or to South Carolina or Florida could not be severed to eliminate the exception, since the statute would be "made to enact what confessedly the legislature never meant" and "confers upon the statute a positive operation beyond the legislative intent, and beyond what every one can say it would have enacted in view of the illegality of the exceptions").

[4] In *Jones & Laughlin*, severability was not an issue as the Court was faced with two possible interpretations of a statute and adopted the interpretation that enabled it to sustain the entire statute. Here, part of Section 43 is admittedly unconstitutional and the only question is *how much* of the particular section must be removed.

[Continued]

appeals sought "to save as much of the statute as [it] can," DOL Br. at 19 (citing *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)),[5] respondents suggest that adherence to separation of powers principles requires saving as many words as possible in a statutory section. But a test designed merely to preserve words can create a power greater than Congress intended to convey and thereby destroy, not preserve, the congressional purpose. And since a court's responsibility is not mechanically to save words, but to preserve the congressional intent, the issue should not be whether the remaining phrases of Section 43 function without the excised portions but rather whether, absent the excised veto, Congress would have sought to achieve its purpose through other means.

In Section 43, where the invalid statutory provision is a procedural measure that reserves power to Congress to make substantive policy decisions later, a finding of inseverability has additional separation of powers implications because the court's actions will bestow more power on the executive branch than Congress intended. In determining severability, Section 43 must be distinguished from other statutes which set forth several legislative policies and the question for the court is simply whether, if Congress had known one of the policies would be declared invalid, it would have made the remaining policy choices. *See, e.g., El Paso & N.E. Ry v. Gutierrez*, 215 U.S. 87 (1909) (cited in DOL Br. at 17, 19). Here, Con-

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[4] [Continued]

In *Tilton*, the Court still analyzed the history of the challenged law and found the section was not essential to the statute as a whole.

[5] The plurality opinion in *Regan* notes a severability presumption that was never endorsed by a majority of the Court. *See* Pet. Br. at 25 n.29. Most importantly, all the Justices who found the provision unconstitutional examined the legislative history to determine if Congress would have been satisfied with what remained after severance.

gress reserved the power to make fundamental policy choices concerning the scope and design of the EPP, *e.g.*, benefit levels, scope of hiring duty, interrelationships between benefits and hiring preferences, after reviewing the agency's proposals. The scheme of shared legislative—executive responsibility for the EPP's development uniquely created in Section 43(f) may offend the principle of separation of powers. However, by invalidating the procedural provision that reserves the ultimate power to Congress but sustaining the responsibilities delegated to DOL, the court shifts legislative power to the executive, thus depriving Congress of the authority that it had intended to reserve to itself. *See Chadha*, 462 U.S. at 1014 (Rehnquist, J., dissenting) (quoting *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)); Pet. Br. at 24 n.27.

B. The Severability Test Established By The Court Of Appeals Requires Judicial Reconstruction Of Remaining Statutory Provisions.

Respondents do not dispute that the court of appeals changed the *Champlin* test by asking only whether "Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision." 766 F.2d at 1565 (28a). Respondents endeavor to reconcile this test with *Champlin*, contending that "[t]he court of appeals asked precisely the right question. The district court had only two choices when it found the legislative veto portion of the EPP invalid: save the duty-to-hire provisions or strike the duty-to-hire provisions." DOL Br. at 19. But these two choices are not the only options that would have been available to Congress and therefore are not the only considerations relevant in determining whether "the legislature would have been satisfied with what remained." *Champlin*, 286 U.S. at 235. Respondents ignore the possibility that although Congress wanted to provide some insurance against employee dislocation, the invalidated provision was such an integral part of Section 43(f) that Congress

would not have passed that subsection in the form it did without substituting language limiting DOL's unbridled discretion to determine the dimensions of the EPP.

Respondents claim that "petitioners' approach would force the courts into speculation about legislation Congress did not enact." DOL Br. at 20. While the determination of legislative intent may involve inferences, those inferences are well-grounded in the established tools of statutory construction. In determining congressional intent, there is no easy substitute for a critical analysis of the existing evidence. Where the evidence suggests that Congress would not have been satisfied with the remaining provisions of the statutory section, the invalid provisions should not be severed, and Congress should be left to exercise its authority to enact another statutory provision to achieve the original legislative purpose.

Respondents' alternative is to ignore the specific indicia of legislative intent and allow courts to reconstruct the remaining provisions of a partially invalid statute whenever the court believes the statute serves an "important purpose." Respondents argue that this approach leaves to Congress the task "of revising the EPP, should it choose to, in light of the demise of the legislative veto." DOL Br. at 19. While respondents' approach is superficially appealing since it avoids a detailed inquiry into congressional intent and maintains some of the legislation originally enacted, its danger is that it involves the courts in redefining rights and responsibilities of private parties and making policy judgments in areas where Congress has not made the final judgments.[6]

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[6] Respondents' approach may reflect the view that Congress is busy and may not reenact a constitutionally valid provision. But if the issue remains important, as respondents maintain, Congress will act. *Compare EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), *with* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (Congress reenacted the Reorganization Act without the legislative veto provision immediately after the court found that the legislative veto could not be severed).

The judicious course is to remember that "[t]he legislature always has the constitutional power to re-enact the valid provisions of a law which was nullified on grounds of inseparability." Note, *Separability and Severability Clauses*, 51 Harv. L. Rev. 76, 115 (1937). Under separation of powers principles, congressional reenactment is clearly preferable to a court's striking only part of an integrated and specific delegation of regulatory authority and allowing that court-amended authorization to operate in a manner Congress never intended. *See Davis v. Wallace*, 257 U.S. 478 (1922).[7]

Respondents sidestep the separation of powers problem inherent in their position by overstating petitioners' position. Petitioners do not contend that "if a court finds anything in the otherwise valid balance of a statute that it guesses Congress might have written differently . . . the Court must strike the whole enactment . . . ." DOL Br. at 20. Petitioners' position is simply that a court cannot ignore evidence that, if Congress had known that the legislative veto provision was invalid, it would have preferred to enact an employee protection program different from what can be reconstructed from the remaining provisions of Section 43(f). In the instant case, Congress certainly had before it alternative approaches to employee protection in both the House and Senate bills as they were submitted to Conference.[8] Applying the proper test, a court reasonably could infer that if the House or Senate had known that it would not have

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[7] "Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and *no other authority* is competent to give them a larger application."

257 U.S. at 484-85 (emphasis added).

[8] *See infra* at 14.

ultimate veto power over DOL's design of the program under Section 43(f), it would have defined the program more precisely.[9]

This case demonstrates in practical terms the consequences of replacing a meaningful analysis of legislative intent with mechanical formulas designed to preserve anything that can operate independently. Respondents repeatedly concede that Section 43's mandatory financial benefit guidelines have never been promulgated, DOL Br. at 22, 23 n.11, and 43, and further concede that the duty-to-hire regulations were promulgated some five years after the statutory deadline, and after this Court invalidated the legislative veto in *Chadha*. DOL Br. at 7. Respondents' severance test thus sustains regulations which belatedly establish an expansive discretionary regulatory program, completely detached from the financial benefits Congress required, and which impose on a minority of the air carriers a duty to hire "protected employees" whose job loss had nothing to do with deregulation and who now may be employed by another carrier.[10] The exercise of regulatory authority that respondents' severability test would preserve is thus radically different

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[9] Respondents simply do not address the numerous unresolved issues in the duty-to-hire provision that Congress left for subsequent resolution by administrative action subject to congressional review. *See* Pet. Br. at 37. And, of course, Congress intended that the duty-to-hire and financial benefit provisions would operate as an integrated program. *See infra* at 16-17.

[10] 48 Fed. Reg. 52,854, 52,862 (1983). DOL's regulations also override air carrier safety-related statutory hiring obligations and most affirmative action requirements. Many of these issues are being addressed in a case pending before the United States Court of Appeals for the D.C. Circuit. *Alaska Airlines, Inc. v. Brock*, 632 F. Supp. 178 (D.D.C. 1986), *appeals docketed*, Nos. 86-5042 and 86-5085 (D.C. Cir. Jan. 27 and Feb. 13, 1986). They are relevant here, however, to the extent they illustrate that preserving the remaining provisions of Section 43(f) without the veto can operate in ways Congress did not intend.

from the authority Congress intended to confer upon DOL.

II. RESPONDENTS DO NOT REFUTE EVIDENCE THAT CONGRESS WOULD NOT HAVE ENACTED THE REMAINING PROVISIONS OF SECTION 43 IN THE FORM IT DID WITHOUT THE VETO PROVISION.

In most statutes which include a legislative veto, it is apparent that: (1) the remaining provisions are operative without the invalid provision, and (2) the power delegated without the veto restriction is greater than Congress intended. Adopting the first truism, the court below would hold all legislative vetoes presumptively severable. Adopting the second truism, the U.S. Court of Appeals for the Fourth Circuit would conclude that since a legislative veto "restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

While the circuits differ, under this Court's precedent, neither approach can be substituted for a careful examination of the language, structure, and history of the statutory provision to determine whether the legislative veto is such an integral part of the specific authorization that Congress would not have delegated the authority without the veto. Yet respondents contend that evidence that Congress would not have enacted the remaining language in Section 43 is not relevant to whether "Congress . . . would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision." 766 F.2d at 1564 (26a). Thus, respondents reject important evidence demonstrating Congress' specific intent to defer certain policy issues and instead to reserve power to exercise final control over the ultimate design of the EPP.

A. Under Its Severability Standard, The Court Of Appeals Rejected Evidence That Congress Would Not Have Enacted The Remaining Provisions Of Section 43 Without A Legislative Veto.

Petitioners and respondents agree that the starting point for severability analysis is the language and structure of the statute itself, which "must ordinarily be regarded as conclusive." DOL Br. at 21, Pet. Br. at 28 (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Petitioners and the district court thus thought it highly relevant that in the "long and comprehensive" Deregulation Act, 594 F. Supp. at 95 (34a), which addresses over 25 regulatory delegations, there is only one legislative veto provision, and that provision is incorporated in, and exclusively applies to, the single subsection that delegates authority to DOL, a department not otherwise engaged in airline deregulation.[11] That veto is an integral part of detailed restrictions on DOL's regulatory power, including a six month deadline, a thirty day review period before certain congressional committees, and a sixty "legislative" day review period before each house of Congress. As the district court found, "[t]hese elaborate procedures are, in fact, apparently unique among the 200 statutory legislative veto provisions enacted by Congress in the extent to which they ensure congressional control over the regulatory process." 594 F. Supp. at 95 (34a-35a). Yet under its novel standard, the appellate court brushed aside this evidence of the language and structure of Section 43 because it "does not speak to whether Congress would have preferred no employee protection plan at all." 766 F.2d. at 1563 (25a). *See also* DOL Br. at 27.

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[11] It is also significant that at the same time it strengthened the legislative oversight in Section 43, the Conference Committee eliminated a legislative veto in the automatic entry program, one of the most controversial provisions in the Deregulation Act. *See* Pet. Br. at 42.

Respondents further disregard evidence that without the veto check, Congress may well have preferred another form of employee protection, DOL Br. at 16, when in fact, such evidence would be highly relevant to whether Congress would have been satisfied with the remaining provisions of Section 43. Contrary to respondents' contentions, the House-passed bill represented a traditional form of employee protection that was commonly applied in the transportation industry. Indeed, the House provision explicitly referenced employee protection provisions in two railroad acts. H.R. 12611, 95th Cong., 2d Sess. § 32 (1978) (citing the programs in the Interstate Commerce Act, 49 U.S.C. § 11347 (1982) and the Rail Passenger Service Act, 45 U.S.C. § 565 (1982)). Congress was familiar with this form of labor protection and the incorporation of a legislative veto, therefore, would hardly have appeared necessary. The Senate-passed bill, on the other hand, contained stringent threshold requirements for both the financial portion and the duty-to-hire provisions of the EPP. S. 2493, 95th Cong., 2d Sess. § 22 (1978). Either the House or Senate bill would have provided DOL more guidance than the bill which emerged from Conference.

Respondents recognize that the Conference bill was a compromise between two entirely different employee protection approaches, but fail to mention that the Conference bill was in many respects broader than the legislation passed by either house. First, the Conference Committee cut in half the threshold qualification requirements for financial benefits and, secondly, it apparently removed these requirements entirely from the duty-to-hire provisions, leaving no guidance as to how Congress intended to relate the duty-to-hire obligations to employees dislocated by deregulation. The Conference Committee simultaneously retained the one-house veto provision and strengthened its legislative oversight by adding the thirty day committee review requirement. H.R. Conf. Rep. No.

1779, 95th Cong., 2d Sess. 106 (1978). Thus, after Conference, the EPP authority was significantly different —in some respects broader in scope and in other respects less detailed—than the authorities contained in either the Senate or House bills.[12] *Id.* at 104-06. Congress left certain key policy issues unresolved. It could do so with confidence, however, because it had strengthened its hand in the development and approval of whatever program the Secretary of Labor might propose.

Despite the substantial evidence that without the veto provision, Congress would have defined more precisely the parameters of employee protection or chosen a more traditional approach, the court below simply dismissed this evidence because in its view the question is not whether Congress would have enacted the "exact statute," but rather whether Congress would have preferred this statute after severance, "to no statute[] at all." 766 F.2d at 1560 (18a).

B. The Legislative Veto Was An Integral Part Of The Restricted Authority Delegated To DOL Under Section 43(f).

By applying the wrong severability standard, the court below disregarded the evidence that Congress would not have passed Section 43 without a legislative veto. *See id.* at 1563 (25a). If such evidence had been properly considered, the court would have concluded, as did the district court, that when a legislative veto provision is so "mutually connected with and dependent on [other

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[12] As the district court noted, "the Conference Committee report indicates that the legislative veto provision, taken from the Senate bill, was significantly strengthened before passage by the addition of the requirement that final regulations be submitted to Congress thirty days before they are issued." 594 F. Supp. at 95 (35a-36a) (citations omitted). DOL concedes that "this 'report and wait' provision by its terms gives Congress no substantive authority," DOL Op. Br. at 8, but the veto provided the essential leverage that makes all the additional oversight procedures in Section 43(f) meaningful.

provisions of the section] . . . to warrant a belief that the legislature intended them as a whole, . . . all the provisions which are thus dependent, conditional or connected, must fall with them." *Warren v. Charlestown*, 2 Gray 84, 99 (Mass. 1854).

Respondents argue that Senator Zorinsky's proposed amendment, which sought to eliminate the financial benefits portion of the EPP and retain only the duty to hire, shows that Congress considered the veto to be important only as it related to the more controversial financial assistance component. Brief for Respondent Air Line Pilots Association at 31-32. Significantly, however, the Zorinsky bill retained the legislative veto as a check on the duty-to-hire program. Moreover, the Senate rejection of the Zorinsky bill further demonstrates that Congress wanted an integrated program with both financial benefits and a duty to hire.[13] Congress specifically rejected

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[13] Respondents refuse to recognize that although Congress *could* have specified that Section 43(f)'s legislative veto provision applied only to regulations regarding a portion of the EPP, it chose not to separate the EPP into individual parts. Rather, it envisioned "[t]he interaction of these provisions," S. Rep. No. 631, 95th Cong., 2d Sess. 116 (1978) ("Senate Report"), resulting in a unified program of employee protection in which the duty-to-hire and financial assistance provisions operated in tandem. *See* Pet. Br. at 40 n.49. Further evidence of the interaction of the financial assistance and duty-to-hire portions of the program is contained in the duty-to-hire provision itself, Section 43(d)(3), where Congress instructed the Secretary of Labor, "[i]n addition to making monthly assistance or reimbursement payments under this section," to "encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority." And the financial assistance provision in turn indicates Congress' intent that the two parts of the same section of the statute should operate together by mandating that an eligible protected employee's monthly assistance payment shall depend upon whether that "eligible protected employee is offered reasonably comparable employment." Section 43(b)(2).

the approach ultimately taken by DOL of limiting the EPP to the duty to hire.[14]

Respondents further argue that because Congress did not explain in detail *why* the legislative veto was important, a court cannot draw the inference that Congress considered the legislative veto to be an integral constraint on DOL's authority. But the test of severability does not depend on the amount of time Congress devoted to discussing a particular provision. A legislative provision that Congress finds vitally important is not necessarily the subject of extensive debates. Congress normally only devotes extensive time to measures that are controversial or whose purposes are not clear. Here, Congress clearly understood the purpose of the legislative veto (to retain ultimate control over the design of the EPP), and its inclusion in the EPP was never controversial.

In addition, respondents contend that the EPP adopted by the Conference was not particularly unique but is "similar to ones that had been approved 'in certain cases in the past,'" DOL Br. at 26 (quoting S. Rep. No. 631, 95th Cong., 2d Sess. 113 (1978)). Respondents do not dispute, however, that the EPP's in other statutes had dealt with specific companies, workers, route terminations, and employment dislocations that were a direct result of some private transaction or government approval. In Section 43, Congress was proposing for the

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[14] Given DOL's decision to jettison the financial benefits portion, it is ironic that it highlights the statement in the Senate Report that "[b]ecause it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform. . . ." DOL Br. at 30 (quoting Senate Report at 114). DOL's regulatory program imposes the full cost of employee dislocation only on certain covered air carriers. Moreover, if DOL had adopted the financial benefit regulations required by Section 43(f), it would have recognized the need to restrict the hiring duty to employees affected by deregulation in order to limit the hiring pool and hold down costs to the federal government, as Congress intended. *See* Senate Report at 116.

first time an unemployment insurance plan coupled with a system of generous employee re-hire rights that addressed not just "individual firms or individual employees, but rather, the general regulatory structure [encompassing] all of the areas and all the workers in the industry." *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 709 (1977) (statement of Robert E. Ginther, Committee staff member). *See also* Pet. Br. at 33-34. Given the unique nature of the EPP, the inference is strong that Congress included the legislative veto to reserve ultimate control over the program's design.

Finally, respondents' contention that "employee protection was a central concern" of the legislators, DOL Br. at 29, is belied by the actions of Congress both during consideration of, and subsequent to, enactment. First, most airline deregulation legislation did not include employee protection because most legislators recognized that deregulation would create jobs, and that additional insurance was probably unnecessary because of the government's preexisting authority to condition approval of air carrier transactions on the inclusion of labor protection provisions.[15] In addition, respondents have not explained why, despite its purported importance, Congress has failed to appropriate any funds for the EPP, or why DOL has not proposed the financial guidelines mandated by Congress which respondents claim were the most significant and far-reaching aspect of that program.

There is no small irony in the Secretary of Labor's contention that Congress was primarily concerned with exercising a veto over the financial benefits portion of Section 43. Respondents essentially argue that although the EPP was very important to Congress, primarily because of the financial assistance provisions, and that the

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[15] *See* Pet. Br. at 34-36.

legislative veto was a check on this aspect of the EPP, this Court can ignore the importance of the veto because Congress has not appropriated funds and DOL has not issued the mandatory financial assistance regulations. Such an argument is internally inconsistent, and should not serve as a pretext for disregarding the importance of the veto as the ultimate congressional check on both aspects of one integrated program. Respondents' claim that some sort of employee protection was so important to Congress that it would prefer anything, even a program that operates contrary to congressional intent, to nothing at all, must be rejected.

CONCLUSION

Without the legislative veto, Congress would not have been satisfied with the remaining provisions of Section 43. This Court should therefore find the veto provision inseverable from the remainder of that statutory section and reverse the decision of the court of appeals.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT M. WEINBERG
PETER O. SHINEVAR
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:

Bowsher v. Synar, 54 USLW 5064 (U.S. July 7, 1986) 7

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) 10-11

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 5

Furniture Moving Drivers v. Crowley, 467 U.S. 526 (1984) 5

Illinois Commerce Com'n v. I.C.C., 749 F.2d 875 (D.C. Cir. 1984) (Scalia, J., dissenting), *cert. denied*, 106 S.Ct. 70 (1985) 9

STATUTES:

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*

Section 43, 49 U.S.C. App. § 1552 ..... *passim*

LEGISLATIVE HISTORY:

124 Cong. Rec. 10, 662 7

124 Cong. Rec. 10, 682 8

124 Cong. Rec. 38, 522 8

MISCELLANEOUS:

Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984) 5, 9

Choper, *Judicial Review and the National Political Process* (1980) 5

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 96 national and international unions with a total membership of approximately 13,000,000 working men and women. AFL-CIO unions and the members of those unions will be directly affected by the result reached in this case. In addition, the AFL-CIO has a more general interest in the

standards that are applied to resolve questions of severability when a portion of a statute is invalid.

SUMMARY OF ARGUMENT

The question in this case is not whether the statute is severable, but rather at what point the statute should be severed. Petitioners argue for excision from the Airline Deregulation Act of 1978 of the whole of the Act's employee protection provisions. Respondents, on the other hand, support the position of the court of appeals that only the part of the Act providing for the unconstitutional legislative veto should be severed.

We show in this brief that it is not the court below but petitioners who offer a result that is unfaithful to the will of Congress. Like much legislation involving matters of economic regulation, the ADA is in significant part the product of negotiation and compromise among legislators holding different views and priorities and among contending interest groups. The legislative process that culminated in the passage of the ADA involved intense lobbying by, among others, the following constituencies: consumers, the airline industry, smaller communities, regions of the country, and unions representing employees in the industry. Each of these constituencies asserted a different set of interests with respect to the subjects of the legislation. The enacting consensus ultimately formed in Congress was the result of compromises and trade-offs made among legislators who placed vastly different values on these diverse interests.

The enactment of the employee protection provisions of the ADA must be understood as the product of this process. What petitioners seek in this case is to alter the bargain that was the basis for the legislation. By depriving protected employees of the "first right of hire," petitioners would be freed of an obligation Congress placed upon them as a condition of deregulation and would thus achieve for themselves a better deal than that which is

embodied in the congressional enactment. Protected employees, on the other hand, would be deprived of their part of the legislative bargain.

Where the terms of legislation are a function of compromise between diverse interest groups, invalid statutory provisions should not be severed from the rest of a statute if to do so would alter the legislative bargain that was reached. The result petitioners urge would alter the legislative bargain embodied in the ADA. The result reached by the court below is, on the other hand, faithful to that bargain.

ARGUMENT

1. The question posed by petitioners is not *whether* the unconstitutional legislative veto provision of the Airline Deregulation Act of 1978 (hereinafter "ADA" or "the Act") should be severed from that Act. Indeed, no party to this case is contending that the statute at issue here is *not* severable. The petitioner airlines differ from the court of appeals as to *the point at which the severance should take place.* The airlines contend that the entirety of § 43 of ADA—which contains the whole of the employee protective provisions of the Act—should be severed. The court of appeals determined that only the portion of § 43 that provides for the unconstitutional legislative veto is to be severed. In practical terms, what hangs in the balance is whether the "first right of hire" that Congress provided in § 43(d) of the Act to a statutorily defined class of protected employees should be invalidated.[1]

It is our submission that the very principles underpinning the legislature's primacy in the development of statutory law that petitioners recite at length in their

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[1] The "monthly assistance payments" portion of § 43 has never been implemented. That part of the Act is expressly made "subject to such amounts as are provided in appropriations acts. . . ." § 43(a)(1). Congress has never appropriated any money to fund this program.

brief—principles with which we agree—preclude the result that petitioners urge in this case. For it is not the court below but petitioners who offer a result that would fail to effectuate the will of Congress as embodied in the ADA.

The respondents in this case have persuasively documented: that Congress directly created with considerable specificity a "first right of hire" for a class of protected employees; that by virtue of § 43(d) that right exists unconditionally without the need for any subsequent action by the Secretary of Labor; that any regulations the Secretary might choose to issue to implement the "first right of hire" must be within the quite specific parameters of that right spelled out by Congress in the Act; and that the reasons for inclusion of the one-house veto provision in the Act had to do with a distinct employee benefit provision (which has since effectively become moot)—the monthly assistance payments provision—which is not self-implementing but requires action by, *inter alia*, the Secretary before it would become effective. We do not intend here to rehash the submissions of the respondents on these points. Suffice it to say in this regard that respondents have shown that severing the unconstitutional veto provision from the bill—or severing that provision together with the monthly payments provision—would not infringe Congress' legislative prerogatives nor alter the careful balances that Congress struck in enacting the ADA.

While it is unnecessary to go further, we believe it is useful to explore the implications of severing the statute at the point urged by petitioners—*viz.*, removing the entire employee protection provision from the ADA. Such an inquiry serves to focus the factors that should guide resolution of questions of severability. In contrast to the point of severance chosen by the court below, severing the statute at the point urged by petitioners *would* alter a balance struck by Congress and constitute a judicial trespass in the legislative province.

2. Like much legislation involving matters of economic regulation, the ADA is in significant part the product of negotiation and compromise among legislators holding different views and priorities and among contending interest groups. This Court has taken note of this phenomenon in the contexts of labor and environmental legislation. See, e.g., *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 542 (1984) ("Like much federal labor legislation, the statute was 'the product of conflict and compromise between strongly held and opposed views. . . .'"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 847 (1984) ("As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs."). See also Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 17, 46 (1984); Choper, *Judicial Review and the National Political Process* 9 (1980).

The legislative process that culminated in the passage of the ADA had the potential directly and immediately to affect the lives and fortunes of consumers, the airline industry, smaller communities, regions of the country and employees in the industry. That process therefore engaged the intense lobbying efforts of all of those constituencies, each expressing a different view on the extent to which airlines should be deregulated and, passing that, on the myriad ways in which deregulation should be accomplished. The enacting consensus ultimately formed in Congress was the result of compromises and trade-offs made among legislators who placed vastly different values on these diverse interests.

As is generally the case with major economic legislation, those compromises reflected a calculus of the public interest, of politics, and of publicity and persuasion.

The series of initiatives and responses, agreements and disagreements that produced the final bill were shaped also by the rules, procedures and understandings that Congress has formulated to serve its 535 members' needs, and to allocate power between those who seek immediate legislative action and those who desire more deliberation or seek to preserve the status quo. And, of course, the participants in this legislative debate were all acutely conscious of the fact that Congress has much to do and little time in a session in which to do it, that time and tide wait for no man and no legislative measure, and that delay is therefore often a weapon for the weak and that compromise with these delaying forces is often a weapon for the strong. It is this complex of forces generated by the legislative system as it works in the Congress of the United States that determines which bills are introduced, which are seriously pursued, which survive scrutiny in committee hearings and mark-ups, which are scheduled for floor action and, for those few bills that make it through these tests, what is subtracted that the original proponents desired and what is added that the original opponents desired in order to achieve an enacting consensus.

The ADA's legislative path is well described in the following excerpt from a floor speech by Senator Goldwater:

> The distinguished Senator from Nevada (MR. CANNON), and now the committee's chairman, deserves great credit for having tried to achieve a consensus on this highly complex legislation. That total agreement proved impossible is no reflection on him, but rather it is a result of having to reconcile many conflicting claims, some of which are:
>
> First. Consumer desires for lower air fares during a period of escalating costs, especially fuel.
>
> Second. Varying financial conditions of the airlines and their ability to compete in a more open marketplace.

> Third. Regional differences affecting access to the national air transportation system.
>
> Fourth. Workers in the industry fearing a shakeout and a loss of jobs.
>
> Fifth. Reluctance on the part of long-term lenders to provide capital during a period of financial uncertainty in the industry.
>
> Sixth. Fears by smaller communities that the airlines will compete on the longhaul, dense routes and therefore, they will lose service.
>
> These are some of the concerns that came into play during the markup of S.2493.
>
> It took a recordbreaking 20 markup sessions to produce a bill. I submit that is a pretty good indicator of the amount of disagreement or doubt on the part of the committee members. [124 Cong. Rec. 10,663-64 (1978)].

The enactment of § 43 must be understood as the product of this process. In the tug and haul of the process, Congress determined that covered airlines seeking deregulation would have this price to pay: a protected class of employees would have the "first right of hire" if those employees should lose their jobs for reasons other than cause during the ten year period immediately following enactment of the ADA. Payment of this price was part and parcel of the concensus that enacted the bill. Thus, when Senator Hatch proposed an amendment to remove altogether the employee protective provisions from the bill, Senator Kennedy responded:

> Mr. President, I hope the amendment of the Senator from Utah will be defeated. In this legislation, we are effectively guaranteeing service to small communities in this Nation for a period of 10 years. We are maintaining certain basic protections for the airlines and their shareholders for a period in the future. Airlines are even permitted to protect certain selected routes from automatic entry despite the anticompetitive effect of such protection for airlines. We are writing in guarantees for just about every aspect

> of the airline industry. That happens to be the fact of the matter.
>
> We also have a limited employee protection policy written into this legislation. That is only fair; but the amendment of the Senator from Utah would strike it out. I say we are protecting the stockholders, we are protecting the communities, and we are protecting the airlines with this legislation. The effect of the amendment of the Senator from Utah would be to say, "It is OK to protect all of those people, but we should wipe out and eliminate what limited protections there are for the employees." I say that would be unfair and unwarranted. [124 Cong. Rec. 10,682 (1978)].

Senator Hatch's amendment was defeated by a vote of 85 to 7. *Id.*

Similarly, when Representative Anderson, the ADA's floor manager in the House of Representatives, urged adoption by the House of the conference report on the bill, he was careful to state the provisions providing for employee protection and to give his colleagues the following assurance:

> The House provisions on employee protection and mutual aid were stronger than those in the conference bill. However, the conference provisions are considerably stronger than the Senate bill, particularly with respect to the mutual aid pact, regarding which the Senate proposed no change in existing law. I believe that the conference report goes a long way toward the House proposals and that the conference provisions represent substantial progress for the airline employees. [124 Cong. Rec. 38,522 (1978)].

What petitioner airlines seek in this case is to "alter the balance that Congress had in mind in drafting" the ADA. *Bowsher v. Synar*, 54 USLW 5064, 5070 (U.S. July 7, 1986). By depriving protected employees of the "first right of hire" the airlines would be freed of an obligation Congress placed upon them as a condition of deregulation and would in that way achieve for themselves

a better bargain than that which they obtained in the legislative process. Protected employees, on the other hand, would be deprived of their part of the legislative bargain.

Such a result negates, rather than effectuates, the congressional will. The point is well-made by Professor Easterbrook:

> If legislation grows out of compromises among special interests . . . a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise, not the objectives of the contending interests. . . . [The statute] is designed to do what it does in fact. The stopping points are as important as the other provisions. If the statute gave Group X twenty-five percent of what it wanted, it probably meant contending groups to keep the rest. A court cannot observe that the statute gives Group X more than it had before and then keep moving in the same direction. The compromise was that Group X would get some benefits but not more. When a court observes that Congress propelled Group X part way to its desired end, it cannot assist Group X farther along the journey without undoing the structure of the deal. [98 Harv. L. Rev. at 46].[2]

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[2] *Cf. Illinois Commerce Com'n v. I.C.C.*, 749 F.2d 875, 892-893 (D.C. Cir. 1984) (Scalia, J., dissenting), *cert. denied*, 106 S. Ct. 70 (1985):

> It is my impression that, in the long era of expanding economic regulation that preceded the current trend towards disengagement, zealous regulators more than once turned a legislative compromise into an unqualified victory by successfully urging that the limiting text of a statute be interpreted in light of its "broad remedial purposes"—as though there had been only one side in the Congress, or as though prescribed limitations were less important than the prescrjbed powers which they circumscribed.
>
> * * * *
>
> Legislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored.

The "first right of hire" established and defined in § 43(d) is an integral part of the legislative bargain embodied in the ADA. That legislated right, which is not constitutionally infirm, should not be taken away in the judicial process.

3. Petitioners suggest that all this is not of much moment because, after this Court strikes down § 43, "[i]f Congress wishes to reinstate a statute, it can do so." Pet. Br. at 18. This suggestion does not seem to support an argument for striking down all, rather than only a part, of § 43 or indeed for any particular result; it is equally true that if Congress is not satisfied with a result that preserves the valid parts of § 43, Congress can repeal the provision. More important, this suggestion is cynical in the extreme because it studiously ignores the realities of the legislative process. As we have discussed, § 43 was part of an overall legislative bargain that was arrived at by a transcient coalition of diverse interests. And, Congress did not happen to deal with the question of airline deregulation by random chance. That issue was pushed to the top of Congress' agenda over a thousand competing and worthy public concerns by a unique set of pressures. As the result of the ADA's passage, the other members of the coalition that made passage of the ADA occur have secured their parts of the legislative bargain. They have no interest in now joining with the employee representatives to reinstate the protected employees' part of the package. Thus, while there is no question that the Congress that enacted the ADA meant to establish a "first right of hire" for protected employees, there is no guarantee that the congressional coalition that enacted ADA could now be reconstructed to reenact the "first right of hire" by itself; indeed such a reenactment is wholly improbable.

4. The classic formulation of the standard of severability stated in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932), makes clear that the issue is one of legislative intent:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

As with other questions of legislative intent care must be taken to understand the values and interests that are embodied in the enactment. Where the terms of legislation are a function of compromise among diverse interest groups and one provision is invalid, the judicial task in determining whether the statute is severable, and if so what is the proper point of severance, is to ensure that nothing is done to upset the legislative bargain. To be sure, by definition any severance works some change in the balance struck in the enactment. But there are cases where a point of severance may be found that is faithful to the essence of the legislative bargain. In this case, the court of appeals found that point. On the other hand, the result petitioners urge would alter the legislative bargain embodied in the ADA.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT M. WEINBERG
PETER O. SHINEVAR
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390